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LEADING CASES MADE EASY.

A SELECTION OF
LEADING CASES IN THE COMMON LAW.

With Notes.

BY

W. SHIRLEY SHIRLEY, M.A.

BARRISTER-AT-LAW, OF THE INNER TEMPLE, AND NORTH-EASTERN CIRCUIT.

"Ridentem dicere verum

"Quid vetat? ut pueris olim dant crustula blandi

"Doctores, elementa velint ut discere prima."

HOR. SAT. I. 1. 24.

"This book is writ in such a dialect

"As may the minds of listless men affect;

"It seems a novelty, and yet contains

"Nothing but sound and honest [legal] strains."

BUNYAN, *Apol. Pilgr. Progr.*

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TO MY FRIENDS,
(AND, TILL RECENTLY, MY COLLEAGUES,)
THE COMMITTEE
OF THE
UNITED LAW STUDENTS SOCIETY,
(W. C. OWEN, ESQ., REGINALD B. ACLAND, ESQ., H. E. BARREN, ESQ.,
B. T. BARTRUM, ESQ., D'A. B. COLLYER, ESQ., W. DOWSON, ESQ.,
C. KAINS-JACKSON, ESQ., F. B. MOYLE, ESQ., E. H. QUICKE,
ESQ., AND R. G. TEMPLER, ESQ.)

This Work

IS AFFECTIONATELY, AND
WITH EVERY WISH FOR THE CONTINUED PROSPERITY
OF THEIR USEFUL SOCIETY,
DEDICATED.

PREFACE.

THE work now submitted to law students differs considerably from other collections of leading cases.

In the first place, *the number* of cases is much larger. "Fifty or sixty leading cases," says the late Mr. Samuel Warren, "thoroughly understood and distinctly recollected, will be found of incalculable value in practice; serving as so many sure landmarks placed upon the trackless wilds of law. *And why should not the number be doubled? or even trebled?* What pains can be too great to secure such a result?"

My object has been to bring together and to elucidate the 150 cases of most general importance in the Common Law. And, however far short of that object I may have fallen, I think it will be admitted that any student whose diligence enables him to master their names and principles will have laid for himself a good foundation of legal learning.

The present work differs also in *style*. I have adopted it as likely to arrest the attention, aid the memory, and make the study of the law less dry and repulsive.

"That I have written in a semi-humorous vein," says an eminent authority, "shall need no apology, if thereby sound teaching wins a hearing from the million. There is no particular virtue in being seriously unreadable."

Moreover, now and then, in the stating of a case certain deviations from strict accuracy may be discovered. Such deviations (except, of course, where I may have been unfortunate enough to fall into errors) have been made on the "reading made easy" principle. For instance, I have treated nearly every

case as if at *nisi prius*; deeming it undesirable to confuse the student, and withdraw his attention from the true point and effect of the decision by appeals, rules for new trials, &c. And the pleasing, if somewhat rare, spectacle is accordingly presented of a successful litigant getting the speedy justice he is entitled to.

It will be observed, too, that, tho' the volume in which a case may be found is always given, the page is not. My explanation of this unusual proceeding is that I regard it of extreme importance that a practitioner should have at command the exact *volume* in which a leading case is to be found. To remember the exact *page* also, would be knowledge too excellent and unattainable; a Macaulay or a Fuller might achieve it, but not an ordinary person. But by constantly seeing the reference, and taking a kind of mental photograph of it, a student of average memory ought in a short time to find that he knows exactly where an important case is reported.

It is almost unnecessary to add that the work is put forward simply as a Student's Manual—*always remembering that a person does not cease to be a student merely because he is called to the Bar, or admitted a Solicitor*. One of my objects (tho', of course, not the chief one) has been to act as a guide to that masterly and exhaustive work, Smith's Leading Cases. I have adopted nearly all the cases which appear as leading cases in that collection, and have sometimes even followed the lines of the notes.

I gratefully acknowledge help and valuable suggestions from other members of the profession, and particularly from my learned friends, Mr. C. M. Atkinson, of the Inner Temple and North-Eastern Circuit, and Mr. Wilfred Allen, of the Inner Temple; and trust my Leading Cases will prove useful to those for whom they are intended.

W. S. S.

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LEADING CASES MADE EASY.

Adequacy of Consideration not required.

THORNBOROW *v.* WHITACRE.

[1.]

[2 LD. RAYM.]

ONE who knew human nature well has made the not very profound observation that the sight of means to do ill deeds is frequently responsible for ill deeds being done ; or, as he further remarks, that the blame ought really to be laid on opportunity's shoulders. This may be charitably pleaded as an excuse for Thornborow, when, finding himself in company with a flat, he beguiled him into the following agreement :—"Farmer Whitacre," said he, "let us strike a bargain. If I pay you a five pound note down now, will you give me 2 rye corns next Monday, 4 on Monday week, 8 on Monday fortnight, and so on,—doubling it every Monday,—for a year." Whitacre jumped at it ; a fiver never was earned so easily. So the thing was settled. But when our yokel friend came to calculate how much rye he should have to deliver,—the village school-master probably did the sum for him,—he found that it came to more rye than was grown in a year in all England.

Thornborow, however,—there must have been something of the wag about the man,—brought his action and succeeded ; for the court said that "tho' the contract was a foolish one, it would hold in law." There was a

consideration, and as for the other point raised for the defendant, that it was an impossible contract, it was only impossible as to the defendant's ability. As the sequel, however, to this case, the reader will be relieved to hear, that Thornborow was magnanimous enough to spare his prostrate antagonist, and be content with making him pay the costs, and return the five pound note.

Every promise (when the contract is not by deed) requires a consideration to support it. A promise, when the promisor is to get nothing for it, is (in law, of course,—we need not be too cynical) worthless, and might just as well never have been made. *Nuda pactio non parit obligationem*. But law courts, as *Thornborow v. Whitacre* sufficiently shows, are satisfied with the *existence* of a consideration, and do not trouble themselves about its *adequacy*. No matter how slight may be the benefit to the promisor, or the detriment to the promisee (whichever the consideration may happen to be), it is sufficient to support the promise. In one case a man allowed a friend to take some boilers and weigh them. Afterwards he brought an action against him for not keeping his promise to restore them, after weighing them, in as good condition as they were before. For this promise it was held that the mere *allowing to weigh* was a sufficient consideration. “The consideration,” said Patteson, J., “is that the plaintiff at the defendant's request had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit: at any rate, there is a detriment to the plaintiff from his parting with the possession for ever so short a time.”

Bainbridge v. Firmstone, 8 A. & E., and see *Hitchcock v. Coker*, 6 A. & E.

So, *forbearance to sue* in the case of a doubtful claim is a sufficient consideration. And so is labour, tho' unsuccessful.

Longridge v. Dorville, 3 B. & Ald. *Lampleigh v. Brathwait*, p. 3.

In the case of bills of exchange and promissory notes it is presumed, till the contrary is shown, that there is a consideration.

A curious case on this branch of the law is *Shadwell v. Shadwell*, where an amiable old gentleman wrote to his nephew,—

30 L. J.,
C. P.

“MY DEAR L—,

“I am glad to hear of your intended marriage with E. N.; and, as I promised to assist you at starting, I am happy to tell you that I will pay you one hundred and fifty pounds yearly during my life, and until your annual income, derived from your profession of a Chancery barrister, shall amount to six hundred guineas, of which your own admission will be the only evidence I shall receive or require.

“Your ever affectionate uncle,

“C. S.”

In an action against the old man's executors, it was held that this letter amounted to a request to his nephew to marry E. N., and that his promise therefore had a consideration and was binding.

But, tho' it is all very well in theory that it does not matter a bit *what* the consideration is, provided there *is* one, yet if the inadequacy is very striking indeed the presumption of *fraud* arises, and a defendant may on that ground dispute his liability. Whitacre might very well have done this. He might have said—"I have been cheated: I am no scholar, and that chap is: he has swindled me." As it was, he simply demurred to the declaration, and the issue of fraud was not raised.

A *stranger to the consideration* cannot sue upon a contract, altho' it may have been entered into expressly for his benefit, and he may be a near relative of the person from whom the consideration moved. *Tweddle v. Atkinson*, 1 B. & S.

Sometimes money paid away can be recovered on the ground of *failure of consideration*. But the failure must be *total*, and not merely *partial*. A man not long ago apprenticed his son to a watchmaker, and paid a heavy premium. In a year's time the watchmaker died, but it was held that not a farthing of the premium could be recovered, because the lad had got a year's teaching out of the deceased, and therefore the failure of consideration was only partial.

The subject of Impossible Contracts is treated of under *Taylor v. Caldwell*, p. 108.

Whincup v. Hughes,
L. R. 6
C. P.

Past Consideration.

LAMPLEIGH v. BRATHWAIT.

[2.]

[HOB. & S. L. C.]

Thomas Brathwait slew Patrick Mahume. But kings were kings then; and the murderer was fortunate enough to have a friend at court. To this friend then he resorted in his need, and begged him, in the name of all that was charitable, to go to the king, and intercede for his life. Touched by the appeal, this friend,—Lampleigh was his name,—consented to see what could be done, and "did by all the means he could and many days' labour do his endeavour to obtain the king's pardon for the said felony,

viz. in riding and journeying at his own charges from London to Royston, when the king was there, and to London back, and so to and from Newmarket to obtain pardon for the defendant for the said felony." After Lampleigh had taken all the journeys, and been put to all this trouble, Brathwait, as some slight recognition of his services, promised to give him £100. But the storm blew over; Brathwait cheated the hangman; and now proposed to cheat Lampleigh too. In answer to Lampleigh's gentle reminder of the promise to give him £100, Brathwait replied very learnedly that no promise is binding unless it is founded on a sufficient consideration, and that what Lampleigh had done was *a mere voluntary courtesy* quite insufficient to support a promise. "No," said Lampleigh, with much sounder learning, as the event proved, "it was not a mere voluntary courtesy. *You asked me to do it*, and that asking saved it from being a mere voluntary courtesy, and made it a sufficient consideration to found a subsequent promise on." And Lampleigh saw something of that £100.

Services rendered in the past, however eminent, are not generally a sufficient consideration to support a promise. If a plaintiff suing on a warranty were to say in his statement of claim that "in consideration that he (the plaintiff) *had bought* a horse of the defendant, the defendant promised that it was sound," such a pleading might be demurred to. No sufficient consideration would appear for the defendant's alleged promise.

Roscorla v.
Thomas, 3
Q. B.

But a past consideration *will* support a promise when it consists of services rendered by the plaintiff *at the defendant's request*.

This request (Brathwait's for instance) is generally express; the promisor has actually asked the promisee to do what he has done. But sometimes the law *implies* such a request, *e.g.* —

1. Where the plaintiff has been compelled to do what the defendant was legally bound to do. Not content with presuming that the defendant *requested* the plaintiff to settle for him, the law here goes on to presume that, in consideration of that settlement, the defendant *promised* the plaintiff to indemnify him. Both the promise and the request are implied. The acceptor of a bill of exchange must pay it when due; he is primarily liable on it. If he does not pay it,

the holder may sue one of the indorsers and make *him* pay it. In such a case the law presumes that the acceptor asked the indorser to pay it, and presumes further that the acceptor subsequently promised to pay the indorser. And whenever a surety is called on to pay his principal's debt, the law presumes (1) that the principal asked him to pay it and (2) that he went on to promise indemnification. So too, in a case where the plaintiff, a carrier, having by mistake delivered some goods to the defendant, who wrongfully appropriated them, was obliged to pay damages to the proper consignee, it was held that he could recover the amount against the appropriator.

Pownall v. Ferrand,
6 B. & C.

As to when a surety is justified in resisting payment on behalf of the debtor, the question seems to be—What would a reasonable man have done under similar circumstances in a cause entirely his own? Would he have defended the action or not? “No person,” said Lord Denman once, “has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action he cannot defend.”

Brown v. Hodgson, 4
Taunt.

Tindall v. Bell, 11 M.
& W.

A distinction is to be observed between compulsion by law and compulsion by agreement. If it was merely by agreement that the defendant was bound to do what the plaintiff has been compelled to do, the plaintiff must sue him on the special agreement and not on implied *assumpsit*. This was held in a case in which the defendant had agreed to pay certain taxes which the landlord was by statute bound to pay.

Short v. Kalloway,
11 A. & E.

Spencer v. Parry, 3
A. & E.

2. Where the promisor has adopted the benefit of the consideration. Here too both request and promise are presumed. If a tradesman sends me a quantity of things which I did not order, but have no objection to keep, the law presumes (1) that I asked him to send them, and (2) that I promised to pay for them. The maxim *omnis ratihabitio retrotrahitur et mandato priori equiparatur* applies.

3. Where the promisee has voluntarily done what the promisor was legally compellable to do, and the latter in consideration thereof expressly promises. Jones owes his tailor £50, and I, with that good nature for which I am proverbial, pay it for him, whereupon Jones promises to repay me the money. Here, it must be noticed, it is only the request that is implied.

Wing v. Mill, 1 B.
& Ald.

It is to be observed that *Lampleigh v. Brathwait* is also an authority for the somewhat obvious proposition that “labour tho’ unsuccessful may form a valuable consideration.” As to what constitutes a sufficient consideration, see *Thornborow v. Whitacre*, p. 1.

Moral Consideration insufficient.

[3.]

BEAUMONT v. REEVE.

[8 Q. B.]

Henry Reeve seduced Caroline Beaumont. They lived together in immoral intercourse for about five years, when they resolved to separate. In consideration of the cohabitation, Reeve promised to pay her an annuity of £60 a year. But the seducer was also a liar, and this was an action for arrears. It was held, however, that there was no legal consideration for Reeve's promise, and the lady must do without the annuity.

The student must clearly understand that it was *not* because the contract was *illegal* that it was held to be void,—there was no illegality about it,—but simply because there was not what the law counts a *consideration* for Mr. Reeve's promise; so that if the contract had been under seal (when considerations are unnecessary) it would have been binding on him, and the young lady would have “lived happily to the end of her days.” If, however, *future* and not *past* cohabitation were the consideration, such a consideration would be *illegal*, and would vitiate even a contract under seal.

On im-
moral con-
tracts, see
Pearce v.
Brooks, p.
94.

Tho' once the other way, it is now clear law that a merely moral obligation will not support a promise. But a moral obligation which *was once a legal one*, and would be so still but for the intervention of some statute or positive rule of law, is sufficient. A promise, for example, to pay a debt barred by the Statute of Limitations is binding.

See note to
Wennall v.
Adney, 3
B. & P.

A bankrupt who has obtained his discharge is prevented by the Bankruptcy Acts from making a binding promise to pay debts from which those Acts have released him. But it has been recently held

Jakeman
v. Cook,
4 Ex. Div.

that such a promise is binding if made on a new consideration.

Proposal may be retracted before Acceptance.

[4.]

COOKE v. OXLEY.

[3 T. R.]

Oxley having a quantity of tobacco on hand proposed

to Cooke to sell him 266 hogsheads of it. Cooke liked the looks of the offer, but, not being quite able to make up his mind on the subject, asked to be allowed till four o'clock to decide; and Oxley consented to this. But after Cooke had gone away to think it over, Oxley altered his mind and resolved not to let Cooke have his tobacco.

This was an action by Cooke for non-delivery of the tobacco; but he did not succeed, because it was held that, as the agreement was not binding on Cooke till four o'clock, there was no consideration for Oxley's promise, which therefore could be retracted with impunity.

It is to be observed that if Cooke had given Oxley sixpence for keeping the offer open, or if he had agreed to pay a higher price for the tobacco in consequence, there would have been a consideration for Oxley's promise, and he would have been bound by it. The case was followed in *Routledge v. Grant*, and indeed it may be taken to be clear law that a proposal may be revoked at any time before acceptance. It is on this principle that at an auction a bidding can be retracted any time before the hammer goes down. Till then there has been no acceptance of the bidder's proposal.

1 Moo.
& P.

*Payne v.
Cave,*
3 T. R.

It may be convenient here to mention the existence of a number of cases in which it has been held that an action can be maintained for a reward offered in an advertisement at the suit of any person who has fulfilled the conditions therein prescribed. What may be termed the leading case on the subject is *Williams v. Carwardine*, where the defendant had caused a handbill to be published to the effect that whoever would give such information as should lead to the discovery and conviction of one Walter Carwardine's murderer should receive a reward of £20. Soon after this advertisement was issued, the plaintiff was so severely beaten by a man she was living with that she thought she was going to die, and by way of easing her conscience, she gave information which led to the conviction of the man who had beaten her. The gentleman was hanged, and the lady got better. In an action by her against the person who had offered the reward, it was held that she was entitled to succeed, altho' the jury expressly found that she was not induced to give the information by the offer of the reward, but by other motives. "There was a contract," said Parke, J., "with any person who performed the condition mentioned in the advertisement."

4 B. & Ad.

Contracts made through the Post.

[5.]

ADAMS v. LINDSELL.

[1 B. & A.]

Mr. Lindsell, wool-dealer at St. Ives, one day wrote a letter to Messrs. Adams and Co., woollen manufacturers of Bromsgrove, offering to sell them a quantity of wool at a certain price, but adding that he must have their reply, if they wished to close, "in course of post." Now, whereas Bromsgrove is, as every schoolboy knows, in Worcestershire, Mr. Lindsell was ignorant enough to address his envelope to "Bromsgrove, Leicestershire," and in consequence of that mistake his letter reached its destination several days late. Directly Adams and Co. *did* receive it, thinking the offer a decidedly good one, they wrote off and accepted it. But in the meantime Mr. Lindsell had inferred from their silence that they did not want his wool, and the day before their letter reached him, but after it had been posted, had sold it to someone else.

See p. 6. This action was brought for non-delivery of the wool, and the defendant contended, citing *Cooke v. Oxley*, that he had a right to retract his offer till notified of its acceptance, and urging that he could not be bound on his side till the plaintiffs were on theirs. But the court said—"If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their

letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post."

Adams v. Lindsell is the leading case as to contracts made through the post. The rule seems to be now clear and well settled that the contract becomes binding the moment the letter of acceptance is posted, altho' it may never reach its destination. A person not long ago wrote and asked for 100 shares in a company, and the secretary accordingly wrote back informing him that they had been allotted to him. After this letter of acceptance had been posted, but before it had reached him, the applicant altered his mind, and wrote and said he did not want the shares. But it was too late for looking back. The contract was held to have been complete directly the secretary posted his acceptance.

It does not make any difference that it is by the fault of the Post Office that the letter of acceptance has been delayed or lost.

In re Imperial Land Co. of Mar-seilles, Harris's Case, L. R. 7 Ch., and Household Fire Insurance Co. v. Grant, 4 Ex. Div. Duncan v. Topham, 8 C. B. Dunlop v. Higgins, 1 H. L. C.

Formation of Contract.

JORDAN v. NORTON.

[6.]

[4 M. & W.]

Farmer Norton wrote to Farmer Jordan offering to buy a particular mare if the latter would warrant her "*sound and quiet in harness.*" Farmer Jordan wrote back warranting her "*sound and quiet in double harness,*" but saying he had never put her in *single* harness. The mare was taken to Norton's by an agent, who exceeded his authority (and whose act was immediately repudiated) and then—as the experienced reader will have foreseen—turned out to be unsound. This was Farmer Jordan's action for the price of the mare, and the real question was whether

or not there was a complete contract. This question was decided in the negative. "The correspondence," said Parke, B., "amounts altogether merely to this: that the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties have never contracted in writing *ad idem*."

8 M. & W. It takes two to make a contract, and those two must have agreeing minds. That being so, an offer must be assented to in the precise terms in which it is made. *Jordan v. Norton* is an excellent illustration of this. So is *Hutchinson v. Bowker*, where, it having been shown that in the corn trade there was a distinction between "good" barley and "fine" barley, there was held to be no binding contract between a person who offered to sell "good" barley and one who wrote back, "We accept your offer, *expecting you to give us fine barley and full weight*."

3 Q. B. D.;
but see
Stanley v.
Dowdes-
well, L. R.
10 C. P. In the recent case of *Lewis v. Brass*, it was held that, altho' in the written acceptance of a tender there may be an intimation that a more formal document will be afterwards prepared, yet the parties may be bound to the terms of the tender and acceptance. "It has been argued in this court," said Bramwell, L.J., "*that the tender was not accepted pure and simple, but with an additional term*; and this contention was founded upon the circumstance that the letter of the plaintiff's architect after stating that the defendant's tender was accepted, proceeded to say that the contract would be prepared by the plaintiff's solicitors. I do not take this to be the true construction of the documents; it was merely intended that a formal instrument should be drawn up, such as is usually prepared when works of magnitude are undertaken; and, in support of this construction, I may observe that the defendant made no objection to the letter from the architect. The acceptance therefore was pure and simple, and did not impose any additional terms. It is possible that the formal contract would have contained terms not specially mentioned in the tender by the defendant, and in the letter from the plaintiff's architect—for instance, as to the payment of the contract price by instalments, or as to what part of the work was to be first commenced; but the defendant might have successfully objected to the introduction of such terms, and the work would have been proceeded with upon the terms contained in the tender and in the letter."

*Debt, Default, or Miscarriage.***BURKMIRE v. DARNELL.**

[7.]

[6 MOD. & S. L. C.]

Lightfinger wanted somebody to lend him a horse ; but who would lend Lightfinger a horse? He was so suspicious a character that everybody he applied to remarked “ *Walker*,” which he thought not a particularly appropriate reply to one who aspired to be a *rider*. At last he got the weak side of one Darnell, who had no horses himself, but knew some persons who had. To one of these persons, named Burkmire, Darnell went, and, with many expressions of confidence, undertook to be responsible for Lightfinger’s bringing safely back any horse that Burkmire might entrust with him. On the faith of this undertaking—a verbal one of course—Burkmire let Lightfinger have one of the best horses in his stable, and that gentleman rode away, and, as there were neither railways nor telegraphs nor police in 1700, neither he nor the horse were ever heard of again.

This being the state of the game, Burkmire played the only card that was left him : he sued the surety. This card, however, did not prove the trump he anticipated. He found to his cost that he ought to have taken Darnell’s promise in writing. The Statute of Frauds says that a “ promise to answer for the debt, default, or miscarriage of another person ” must be *in writing*, and it was precisely that promise which Darnell had made *by word of mouth*.

So he went away a sadder and a wiser man.

[8.]

MOUNTSTEPHEN v. LAKEMAN.

[L. R. 5 Q. B.]

A builder was employed by the Brixham Board of Health to make a main sewer for them. He got his work finished, and the Board, in the usual peremptory manner of local authorities, gave notice to the neighbouring householders that they must connect the drains of their houses with the main sewer, or else the Board would do it for them at their expense.

The householders displayed the slackness common on such occasions; and Mr. Lakeman, the chairman of the Board, happening to meet the builder in the street a few days afterwards, the following conversation took place:—"Well, Mountstephen," said Lakeman, "you've done the main sewer very nicely for us; would you have any objection to making the connections too?" "Certainly not, Sir; if you or the Board will order the work, or become responsible for the payment, I shall be proud." "*Well then,*" said Lakeman, "*go and do it; I will see you are paid.*"

Mountstephen, therefore, made the connections, the Board's surveyor superintending the progress of the work, and by and by he sent in his account to the Board, debiting them with the account. The Board, however, refused to pay, saying they had not authorised the work. Mountstephen, therefore, brought an action against Lakeman, and it was held that *Lakeman's words were evidence to sustain a claim against him personally*, and that they did not constitute a promise to pay the debt of "another."

The test as to whether or not any undertaking for another should have been in writing is this:—*does that other, after the undertaking has been made for him, remain primarily liable?* If (like Lightfinger) he does, the undertaking cannot be sued on unless it is in writing; if (like the Brixham Board) he does not, it is binding, tho' not in writing. If I go with you into a Bond Street tailor's, and say to the tailor,

"Make this gentleman a pair of trousers, and *if he doesn't pay you, I will*," in this case you clearly remain primarily liable, and I cannot be sued as your surety, because my promise was not in writing. But if, when we go into the shop, I say, "Make this gentleman a pair of trousers, and *put them down to me*," here you are not primarily liable, and therefore the 4th section of the Statute of Frauds does not require my promise to be in writing.

So, too, if the effect of the undertaking is to extinguish another person's debt, so that, tho' up to that time he has been liable, he remains so no longer, the undertaking is binding, tho' not in writing. If, for instance, under the old debtor laws, when the effect of a creditor's liberating a debtor whom he had taken in execution was to release the debt, Weakman promised to pay the amount of Hardup's debt to Holdfast, if Holdfast would release him from arrest, this promise was not within the statute, because the debt was gone by the discharge of the debtor out of custody, and Weakman remained solely liable.

Goodman
v. Chase,
1 B. & A.

When the undertaking has been by word of mouth, it is for the jury to say whether or not the person for whose benefit the promise has been made is primarily liable; and this is a question of fact which, depending as it does on all the circumstances of the case, it is sometimes extremely difficult to decide. On this point the case of *Keate v. Temple* (where a Portsmouth tailor tried unsuccessfully to make a lieutenant in the navy pay for a quantity of coats supplied to his crew,—the defendant having said, "I will see you paid at the pay-table") may advantageously be compared with *Mountstephen v. Lakeman*.

1 Bos. &
Pull.

It has been held that the undertaking of a *del credere* agent, who guarantees the purchaser's solvency, is *not* within the statute, altho' of course such an agent may find himself by and by paying another person's debt.

Couturier
v. Hastie,
8 Ex.

It is to be observed that the words of the statute ("debt, default, or miscarriage") do not refer exclusively to contracts. Accordingly, if my friend Jones wrongfully takes Brown's horse and injures it, and I then promise Brown to pay the damage if he will not take proceedings against Jones, I am not bound, unless I promise in writing. "This case," said Abbott, C.J., in the case referred to, "is clearly within the mischief intended to be remedied by the Statute of Frauds: that mischief being the frequent fraudulent practices which were too commonly endeavoured to be upheld by perjury; and if it be within the mischief, I think the words of the statute are sufficiently large to comprehend the case. . . . The word 'miscarriage' has not the same meaning as the word 'debt' or 'default'; it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly re-

Kirkham
v. Marter,
2 B. & Ald.

sponsible. The wrongful riding the horse of another without his leave and licence, and thereby causing its death, is clearly an act for which the party is responsible in damages ; and, therefore, in my judgment, falls within the meaning of the word ‘miscarriage.’”

[9.]

WAIN v. WARLTERS.

[5 EAST & S. L. C.]

Mr. Warlters was decidedly a fortunate litigant. He had a friend named Hall, who became indebted to Messrs. Wain and Co. to the extent of £56, and with no particular means of payment. To extricate this friend from his difficulties Warlters sat down and wrote out the following collateral security :—

“Messrs. Wain and Co.,

“I will engage to pay you by half-past four this day £56 and expenses on bill that amount on Hall.

“(Signed) JONATHAN WARLTERS.”

No. 2, Cornhill, April 30th, 1803.

Hall, of course, did not pay the money. So Wain and Co. sued Warlters on his guarantee. But the document was held to be so much waste paper, *as no consideration for Warlters’ promise to pay the £56 was expressed in it.*

The Statute of Frauds requires that “the agreement” shall be in writing ; and obviously the *consideration* is as much a part of an “agreement” as the *promise*. But tho’ *Wain v. Warlters* is, therefore, a perfectly correct interpretation of the Statute of Frauds, the law on the subject (so far as regards guarantees) has been changed by the Mercantile Law Amendment Act, passed in 1857. Guarantors were always wriggling out of their engagements (as Warlters did) by technical defences, and, to put a stop to such dishonesty, it was enacted that, provided a consideration did in fact exist, it need not be put into the document, but might be proved by oral evidence.

It is to be remarked that even before the Act of 1857 it was sufficient if the consideration appeared in the document by necessary inference.

Wain v. Warlters is utilised in S. L. C. as the leading case on the "memorandum or note in writing" spoken of in the Statute of Frauds. It is necessary that this memorandum should have been made before the commencement of the action. It need not be very exact in its terms, the principle being that it is *just such a memorandum as merchants in the hurry of business might be supposed to make*. It is necessary, however, that the names of both parties, or at all events, a clear description of them, should appear.

In a recent case the particulars stated that the sale was by direction of "the proprietor," and the question was whether that was a proper description of the seller. It was held to be sufficient. "The question is," said the Master of the Rolls, "can you find out from the memorandum who the vendor is? The property is stated to be put up for sale 'by direction of the proprietor.' Therefore, the proprietor is the vendor, and is referred to as the person who employs the auctioneer to sell. What more do you want? It is said that the term 'proprietor' is not a sufficient description. I think it is an excellent description." In another well-known case the question was whether it was sufficient that *the names of both parties appeared, but the seller was not named as seller*. The memorandum ran, "D. Spooner agrees to buy the whole lot of marble purchased by Mr. Vandenberg now lying at the Lyme Cobb at 1s. per foot." It was intended, of course, that Mr. Vandenberg should be the seller, but the memorandum did not describe him as such, and was, therefore, held insufficient.

The *subject matter* of a contract of sale need not be described very precisely, parol evidence being admissible for the purpose of identification. Thus, "the property in Cable Street," "the house in Newport," and "the land bought of Mr. Peters," have been held to be sufficient descriptions.

As to the signature, it may come in any part of the document, even at the top. It need not be written at full length, or written at all. It may be by initials or mark, and it may be printed or stamped. It is not necessary that the signatures of *both* parties should appear. The signature required is that of "the party to be charged" only; so that a defendant who signed cannot get out of his contract merely by showing that the plaintiff didn't. The party who has not signed may enforce the contract against the party who has.

The terms of the contract, however, need not all appear in the same document. But the connection between various documents cannot be proved by parol evidence; it must appear from the documents themselves. On this point see *Boydell v. Drummond*, p. 30.

The memorandum need not be signed by the party to be charged himself; it may be signed by "some other person thereunto by him lawfully authorised." This authority, in the case of the 4th and 17th

Sale v. Lambert,
L. R. 18
Eq.; and
see *Rossiter v. Miller*,
5 Ch. Div.

Vandenberg v. Spooner,
L. R. 1
Ex.

Baker v. Dening,
8 Ad. & E.
Saunderson v. Jackson,
2 B. & P.

Laythorp v. Bryant,
3 Scott.

Fare-brother v. Simmons,
5 B. & A.
Bird v. Boulter,
4 B. & Ad.
Rucker v. Cammeyer,
1 Esp.
Grant v. Fletcher,
5 B. & C.
Sievwright v. Archibald, 17
Q. B.
Leroux v. Brown,
12 C. B.;
and see
Williams v. Wheeler,
8 C. B.,
N. S., and
Brittain v. Rossiter,
40 L. T.,
N. S.

sections, may be conferred without writing. But one of the contracting parties cannot be the other's agent for the purpose of signing; and for this reason an auctioneer cannot successfully sue on a contract which he has signed as agent, tho', if his clerk has signed, he may. Many contracts are made through brokers, and when a broker is the agent of both parties, his signature binds them. A broker—according to the general practice—first makes an entry of the contract in his book and signs it, and then sends a copy of it to each party—the “bought note” to the buyer, and the “sold note” to the seller; and these notes, if they agree, constitute a sufficient memorandum to satisfy the statute. If they do not agree but vary materially, they do not constitute a binding contract. If there are no bought and sold notes, or if they disagree, it seems that recourse may be had to the entry in the broker's book.

The student should notice a difference in the wording between the 4th and the 17th sections. The 4th says “no action shall be brought” merely, while the 17th declares that no contract within it shall be “allowed to be good.” The 4th section, therefore, refers only to the procedure, and does not affect the intrinsic validity of the contract. This may sometimes be found a fruitful distinction.

[10.]

WHITCHER v. HALL.

[5 B. & C.]

A Mr. Whitcher agreed to let one Joseph Hall have 30 cows for milking purposes at £7 10s. each per annum, and James Hall, like a proper sort of brother, became surety for the due payment of the money. Joseph then entered on his cows, and we will hope he did not water the milk. By and by it chanced, unfortunately, that some of the cows died, and the terms of the letting were in consequence changed without James being consulted on the subject: and indeed it is difficult to see that the alteration in any way really prejudiced him. By the terms of the altered agreement Joseph was to have the milking of 28 cows during one part of the year and of 32 during the other. It does not require a very profound knowledge of arithmetic to discover that the average of 28

and 32 is 30. But altho' there was no substantial alteration of the original terms, yet the court considered that an alteration *was* an alteration, and that James Hall was thereby released from his promise.

It may be added that from this opinion Mr. Justice Littledale dissented, citing the maxim *de minimis non curat lex*, by which he meant that the alterations were so trifling and immaterial as to be not worth considering.

The man who is kind enough to become surety for a friend undertakes a very thankless office ; and the law is jealously anxious to shield him against fraud and imposition. *Whitcher v. Hall* well illustrates the rule that any alteration of the terms of the original agreement by the creditor and the debtor behind the surety's back will exonerate the surety, unless the rights against him are expressly reserved.

The law on the subject has been very recently summed up by Cotton, L.J., as follows :—"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, altho' in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged ; yet, that *if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety*, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case *the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration*, and that if he has not so consented he will be discharged."

Altering the terms is not the only way in which the surety becomes a free man once more. He is always discharged in the following cases :—

(1). If there has been a fraudulent misrepresentation to, or concealment from, him.

(2). If he has executed the instrument on the understanding that another person would be a co-surety, and the person intended as such co-surety refuses to act.

(3). If the principal's default was committed with the connivance or gross negligence of the creditor.

Holme v. Brunskill,
3 Q. B. D.

Lee v. Jones, 14
C. B., N.S.;
and see
Phillips v. Foxhall,
41 L. J.,
Q. B.

Rees v. Berrington, 2 Ves. jun. and Eq. L. C. Croydon Gas Co. v. Dickinson, 1 C. P. D. (4). If the creditor discharges the principal, or enters into a binding agreement to give him time.

(5). If the creditor omits to do something which was the surety's consideration for entering on the undertaking.

And, of course,

(6). If the principal pays the debt.

Of course, some of these are cases, not so much of a discharge from liability, as of liability never having really attached.

It often becomes an important and difficult question whether a particular guarantee is a *continuing* one or not; that is to say, whether the surety's undertaking is to be confined or not to one transaction. The question is to be answered by considering the surrounding circumstances, and getting as near as possible to the intention of the parties. About a dozen years ago a man who had a nephew setting up as a butcher gave a cattle-dealer this guarantee:—

“£50.—I, John Meadows, of Barwick, in the county of Northampton, will be answerable for £50 sterling, that William York, of Stamford, butcher, may buy of Mr. John Heffield, of Donington.”

The young butcher made payments at various times to Mr. Heffield amounting to over £90, but he afterwards failed to meet his engagements; and the question was whether anything could be got out of Meadows as surety. Meadows strenuously maintained that, as his nephew had paid £90, and £90 was a larger sum of money than £50, the guarantee was at an end. But it was held that, as the circumstances showed that the object of the guarantee was to keep the young man going as a butcher, it was a continuing guarantee, and poor Mr. Meadows must pay.

Heffield v. Meadows, L. R. 4 C. P. 19 & 20 Vict. c. 97, s. 5. A surety who has had to pay his friend's debt is entitled to have transferred to him any securities which the creditor may have held, and that altho' he may not have been aware of their existence and they have been given since he entered on the suretyship. And if the creditor has so dealt with the security that on payment by the surety it is no use to him, he is discharged to the extent of the security. He is also entitled to call on his co-sureties (whether

Campbell v. Rothwell, 47 L. J. *Dering v. Winchelsea*, 1 Cox and Eq. L. C. bound by the same instrument or not) for contribution, and it would seem that if there are three co-sureties of whom one has become insolvent, the surety who has been compelled to pay the debt may come upon the remaining solvent surety not merely for an aliquot proportion of the money paid, but for a moiety; if the debt, for instance, was £90, he is entitled not merely to £30, but to £45. This is in virtue of the famous provision in the Judicature Act that, where the rules of law and equity conflict, the latter shall prevail.

36 & 37 Vict. c. 66, s. 25, sub-s. 11.

EASTWOOD v. KENYON.

[11.]

[11 A. & E.]

John Sutcliff, beginning to feel that he wasn't the man he used to be, thought it was about time to make his will, and turn his attention to another and a better world. He left everything he had in the way of real property to his only daughter, and named his friend Eastwood executor. But John Sutcliff was not destined to die just yet; and "mansions in the skies" were not the only estates to which he was busied in making his title clear. Before he died he had sold all the lands mentioned in his will, and bought other lands. Of those he made no will whatever, and when he died, as he did soon afterwards, they descended to his child as heiress at law. This young lady, at the time of her father's death, was under age, and Eastwood, on the strength of the now useless will (in those days a will did not speak from the time of the testator's death), and the fact that he was an old and dear friend of her father's, took on himself to act as her guardian. There is, so far as I am aware, no reason to doubt that he discharged his self-imposed duties faithfully enough. We will hope that he kept off the impecunious younger sons, and the still more objectionable adventurers of the bag-man type, like a man. But Eastwood, with all his good intentions, was a poor man; and, for the purpose of managing Miss Sutcliff's affairs, he found it necessary to borrow money. He borrowed £140 from a person named Blackburn, and gave him his promissory note for the amount.

By and by Miss Sutcliff did what all young heiresses, sooner or later, must do—she got married; the fortunate individual being a Mr. Kenyon.

Recognising his claims to his gratitude, Kenyon promised Eastwood verbally that he would pay Blackburn the

£140. But somehow or other, when the time came, small as the sum was, Kenyon could not bring himself to part with the money; and finally this action had to be brought on his promise.

Kenyon did not deny that he had made the promise. But he raised two objections to the plaintiff's claim:—

(1). That his promise was one “to answer for the debt, default, or miscarriage of another person,” and therefore (by the Statute of Frauds) should have been in writing.

This point was overruled, for the judges said that the words in the statute contemplated the promise being made to the creditor, and had no reference when the promise was made, as here, to the debtor himself.

Beaten from this position, Kenyon retreated to another.

(2). That there was no consideration for his promise.

And this point was decided in his favour, for a mere moral consideration is not strong enough to support a promise.

So Eastwood was £140 out of pocket by his executorship.

Eastwood v. Kenyon is a useful case to remember on both the points decided.

Green v. Cresswell,
10 A. & E. The first point, tho' once doubtful, may be taken to be now clear. Not long ago a man promised a bailiff that, if he would not arrest a relative of the former's for non-payment of a judgment debt, he would pay the money himself; and this promise, tho' not in writing, was held to be binding, as it had not been made to the original creditor, and therefore was not within the Statute of Frauds.

Reader v. Kingham,
13 C. B.,
N. S. For further illustration of the second point the student should refer to the leading case of *Beaumont v. Reeve*, p. 6.

*Interests in or concerning Lands, &c.***CROSBY v. WADSWORTH.**

[12.]

[6 EAST.]

Farmer Wadsworth, of Claypole, in Lincolnshire, had a field of likely-looking grass, which Crosby, with an eye to hay, desired to purchase. Meeting casually one day in June, it was agreed between them that Crosby should have the grass for 20 guineas, only he was to have the trouble of mowing and making it into hay. On this understanding they separated. But, two or three weeks afterwards, Wadsworth again happened to meet Crosby, and remarked pleasantly :—" By the way, I've decided not to let you have that grass of mine ; I don't think your figure is good enough ;" and the same day he sold it to a Mr. Carver for 25 guineas, thus clearing a five-pound note by his diplomacy. Mr. Crosby sued Wadsworth for his breach of contract, but unfortunately took nothing by that, as it was held that the contract was one which had to do with the land, and therefore should have been in writing, as required by the 4th section of the Statute of Frauds.

The case that is always coupled with *Crosby v. Wadsworth* is *Parker v. Staniland*, where it was held that a contract for the sale of 11 East. growing potatoes was not a contract for the sale of any interest in land ; the potatoes being regarded as chattels stored in a warehouse,

It is not easy, if possible, to extract a clear and definite rule from the cases as to when a sale of growing crops is a sale of an "interest in or concerning" lands. Indeed, Lord Abinger has remarked, " It *Rodwell v. Phillips,* must be admitted, taking the cases altogether, that no general rule is ^{9 M. & W.} laid down by any one of them that is not contradicted by some other." And so recently as 1875 Lord Coleridge uttered a similar wail. " For my part," he said, " I despair of laying down any rule which can stand the test of every conceivable case." Perhaps, how- *Marshall v. Green,* ever, the following summary of the law, from Mr. Benjamin's book, ^{1 C. P. D.} will be found somewhere near the mark :—" Growing crops, if

FRUCTUS INDUSTRIALES, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if FRUCTUS NATURALES, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th, and not by the 4th section

Benj. Sale of the statute."

of P. P.
(2nd ed.)
p. 99.

Agn. Stat.
Fr. p. 139.

Mr. Agnew, in his exhaustive treatise on the Statute of Frauds, says, "The author ventures to submit that, in order to carry out the intention of the framers of the statute, the test to be applied in considering whether a contract for the sale of growing crops, whether *fructus naturales* or *fructus industriales*, whether mature or immature, whether to be taken out by the seller or by the purchaser, is or is not within the statute—is, *Did the seller contract to give the purchaser an estate in the land, or did he merely contract for the sale of a chattel, with or without a licence to the purchaser to go upon the land for a particular purpose?*"

Tyler v.
Bennet,
5 A. & E.
Inman v.
Stamp,

1 St.
Massey v.
Johnson,
1 Ex.

Mann v.
Nunn,
43 L. J.,
C. P.

Jeakes v.
White,
6 Ex.

Wright v.
Stavert,
2 E. & E.

As to things other than growing crops, it has been held that an agreement that a person shall be allowed to take water from a well "concerns" land, and must be in writing. So must an agreement to let furnished lodgings, and one to convey an equity of redemption. On the other hand, an agreement by a landlord to build a water-closet for his tenant, an agreement relating to the expenses of investigating the title to land, and one for board and lodging merely, need not be in writing.

Not to be performed within the space of One Year.

[13.]

PETER v. COMPTON.

[SKIN. & S. L. C.]

Those who knew him best did not consider Mr. Peter a marrying man. So it was that Mr. Compton thought he had got decidedly on the right side of the bargain when

one evening in casual conversation across the walnuts and wine this agreement was come to:—Peter to pay Compton a guinea down, in consideration that Compton would pay Peter a thousand guineas on his (Peter's) wedding day. Peter promptly paid down the guinea, and Compton pocketed it with a grin. Peter grinned too.

The next act opens with Peter's wedding day, two years being supposed to have elapsed. Brilliant dresses, lovely bridesmaids, rosettes, church bells, and indigestible cake. But one is conspicuous by his absence. The reader can guess who. When Mr. P. led Mrs. P. away from the hymeneal altar, he sat down and wrote an extremely friendly little note to Compton, reminding him of that pleasant evening they spent together two years ago, and requesting the favour of a cheque for amount due, as per agreement. Compton was considerably taken a-back, but, like a sensible man, he hailed the first hansom, and went straight to his solicitor. That gentleman told him to set his mind at rest; for, said he, in a certain statute enacted of wise men long ago it was provided that an "agreement that is not to be performed within the space of one year from the making thereof" should be in writing. "And how," asked the man of law, complacently stroking his chin, "how the something can they make out that this agreement was to be performed within the year, when this sly dog Peter doesn't get married till two years afterwards? Go home, my dear sir, and don't trouble yourself any more about it."

Unfortunately for Compton, this rather plausible view of the law was not adopted by the judges, who came to the conclusion that the clause in the Statute of Frauds referred only to agreements which in their terms were *absolutely incapable of performance within the year*, and required that such agreements only should be in writing. Now, this agreement between Peter and Compton was

clearly not "*incapable of*" performance within the year, for Peter might have got married the very next day; so that it was binding, altho' not in writing.

If you were to engage a cook or a tutor for a year's service from next Tuesday fortnight, the agreement between yourself and the servant would clearly be one which by its terms was incapable of performance within the year, and therefore would not be binding unless in writing. A general hiring, however, which is construed to be for a year, need not be in writing.

Brace-
girdle v.
Heald,
1 B. & Ald.
Beeston v.
Collyer,
4 Bing.

Supposing the agreement to be in its terms incapable of performance within the year, it must still be in writing, tho' there is a condition which *may* put an end to it within the year. Thus, a contract with a coachmaker to hire a grand carriage from him for five years has been held altogether void because not in writing, although it was part of the agreement that either party might put an end to it at a moment's notice.

Birch v.
Liverpool,
9 B. & C.

On the same principle a contract between a solicitor and an insurance company that the former shall be the company's solicitor *during his whole professional life, and as long as they continue a company*, must be in writing, notwithstanding the chance of the contract's abruptly terminating by death, resignation, or otherwise. So, too, must a contract by one person with another that he will not set up a particular trade *during their joint lives*. But a promise by a man to a woman he had cohabited with to maintain seven illegitimate children *so long as she should maintain and educate them* has been held not within the statute. The question in all these cases is, Is the contract *prima facie* incapable of performance within the year?

Eley v.
Positive,
&c., Assur-
ance Co.,
1 Ex. Div.

Knowlman
v. Bluett,
L. R. 9 Ex.
Davey v.
Shannon,
4 Ex. Div.

The section applies only to contracts which are not to be performed *on either side* within the year; so that *Peter v. Compton* might have been decided on the ground that it had been wholly executed by one of the parties. On this point see *Donellan v. Read*, below.

[14.]

DONELLAN v. READ.

[3 B. & Ad.]

A grumbling tenant represented to his landlord that certain repairs and alterations were necessary to the proper enjoyment of his holding. The good-natured landlord accordingly agreed to spend £50 in improvements, which should be carried out forthwith; and, in consideration of

this, the tenant agreed to pay an additional £5 a year during the remainder of his term. This agreement was made, not in writing, but in the course of an ordinary conversation. The landlord set to work, and in a month or two completed the suggested alterations, and the tenant ought to have duly paid his extra £5 a year. But he failed therein, and this was an action brought against him by his landlord. The defence set up by the tenant was that the agreement was one which, by its terms, could not be completed till the last year of the defendant's tenancy, when the last additional £5 would become due; and, that being so, that it came within the provision of the Statute of Frauds that an "agreement that is not to be performed within the space of one year from the making thereof" cannot be sued on unless in writing.

It was held, however, and is still law, that the statute does not apply where one of the parties is to execute his side of the agreement within the year, tho' the other is not to execute his till long afterwards.

This agreement between the landlord and his tenant was therefore held binding, because by its terms Donellan was to carry out his part of it within the year.

Before this case was decided the contrary of the principle it establishes seems to have been considered the law. The case of *Peter v. Compton* suffices to show this; for the moment Mr. Peter laid his guinea on the table the agreement was executed on his side, and therefore there should have been no necessity to argue that his marriage might have taken place within the year.

It is to be observed that *Donellan v. Read* makes the word "agreement" bear two different meanings in the same section of the Statute of Frauds. In *Wain v. Warlters* we have seen that it includes what is to be done *on both sides*, but in the present case it clearly receives a narrower signification. See p. 14.

Another point raised by the tenant in *Donellan v. Read* was that the agreement came within the statute as referring to land. But it was held that tho' this would have been a perfectly valid objection if the repairs and alterations had been only to be executed because of the lease, it was different when the agreement was only collateral to the lease.

Goods, Wares, or Merchandises for the price of Ten Pounds.

[15.]

BALDEY v. PARKER.

[2 B. & C.]

Mr. Parker has not paid an exorbitant price for fame. He went one day into a linendraper's shop, and bargained for a number of trifling articles, a separate price being agreed on for each, and no one article being priced so high as £10. The articles that Mr. Parker decided to buy he marked with a pencil, or assisted in cutting from a larger bulk. Then he went home—he always did—to tea, desiring that an account of the whole should be sent after him. This was done, and the sum Parker was asked to pay was £70, *minus* 5 per cent. discount for ready money. This discount he quarrelled with, not considering it liberal enough, and, when the goods were sent to him, he refused to accept them.

This was an action by the linendraper against his recalcitrant customer, and the main question was whether the contract was one “for the sale of goods, wares, or merchandises for the price of £10” within the 17th section of the Statute of Frauds, the honest linendraper saying that it wasn't, and the other gentleman saying that it was. The question was decided in the affirmative, the contract having been an entire one, and “it being the intention of that statute,” as Holroyd, J., said, “that, where the contract, *either at the commencement or at the conclusion*, amounted to or exceeded the value of £10, it should not bind unless the requisites there mentioned were complied with.” “The danger,” he added, “of false testimony is quite as great where the bargain is ultimately of the value of £10 as if it had been originally of that amount.”

Where, however, at an auction several successive lots are knocked down to the same person, a distinct contract arises as to each lot. *Emmerson v. Heelis*, 2 Taunt.

But it has been held that, tho' at the time of the contract it is uncertain whether the subject-matter of the sale will be worth £10 or not (*e.g.*, suppose the sale to be of a future crop of turnip seed, which may or may not turn out a success), yet if that figure is ultimately reached, the statute applies. *Watts v. Friend*, 10 B. & C. 9 Geo. IV. c. 14.

It is to be observed that, tho' the word in the 17th section is "*price*," the effect of sect. 7 of Lord Tenterden's Act, which is to be read with the 17th section of the Statute of Frauds, as if incorporated therein, is to substitute the word "*value*." *Harman v. Reeve*, 18 C. B.

It may be added that in the leading case an attempt was made to bring the purchaser within the other part of the 17th section by showing that he had "accepted and actually received" the goods. The continuance of the vendor's lien, however, was held to be fatal to such a contention. *See Elmore v. Stone*, below.

Accept and actually Receive.

ELMORE *v.* STONE.

[16.]

[1 TAUNT.]

Elmore was a livery stable-keeper, and had a couple of horses for sale, for which he wanted £200. Stone admired the horses, but not the price. Finding, however, he could not get them for less, he sent word he would take the horses, "but, as he had neither servant nor stable, Mr. Elmore must keep them at livery for him."

In consequence of this message, Elmore removed the horses from his sale stable into another stable, which he called his livery stable. In an action which he brought for the price, the question was whether such removal was a sufficient constructive delivery to take the case out of the Statute of Frauds, and it was held that it was, as Elmore from that time held the horses, not as owner, but as any other livery stable-keeper might have done.

[17.]

TEMPEST v. FITZGERALD.

[3 B. & A.]

Mr. Fitzgerald, paying a visit to Mr. Tempest, fell in love with one of his host's horses, and finally agreed to buy it for 45 guineas. He could not do with the animal just then, but he said he would call for it on his way to Doncaster races, and Tempest agreed to take care of it in the meantime. Both parties understood the transaction to be a ready-money bargain. Just before the races Fitzgerald returned to Tempest's house, galloped the horse, and gave various directions about it, treated it in every way as his own, and asked his host to keep it a week longer, saying he would return immediately after the races, pay the 45 guineas, and take the horse away. Unfortunately, during the Doncaster race week, the horse died, and mutual recriminations ensued; Tempest contending that the loss ought to fall on Fitzgerald, as the property in the horse had passed to him, Fitzgerald maintaining the opposite view. The latter was the view adopted by the judges, as they considered there had been no such receipt as would satisfy the Statute of Frauds.

While the Statute of Frauds inculcates on contracting parties the importance and desirability of writing, it at the same time permits them to bind themselves if certain other circumstances are present. One of these is an "acceptance and actual receipt" by the purchaser. The words of the statute have been so construed that they are satisfied very often by a constructive acceptance. In *Elmore v. Stone*, for instance, the seller changes his character, and becomes a bailee for the purchaser, losing, of course, his right of lien. Similarly, if a man sold his horse, but asked the purchaser if he would be kind enough to let him keep it a few days longer, and the purchaser consented, there would be sufficient acceptance. *Tempest v. Fitzgerald* may seem, at first sight, to trench rather closely on *Elmore v. Stone*, but in the former case the bargain was one for ready money, and the vendor's lien, therefore, would continue till the price was paid; and

Marvin v.
Wallis,
6 E. & B.

there can be no acceptance by the purchaser as long as the vendor's lien continues. In *Elmore v. Stone*, by consenting to act in a new capacity, the vendor relinquished his lien.

As to the effect of the "acceptance" required by the Statute, it may be mentioned that it is not to preclude a party from disputing that the contract has been properly carried out, but simply to prevent him from objecting that the contract was not in writing.

Morton v. Tibbett,
15 Q. B.;
and
Grimoldby v. Wells,
L. R. 10
C. P.

Goods not yet in Existence.

LEE v. GRIFFIN.

[18.]

[1 B. & S.]

This was an action against an executor to recover the price of two sets of teeth made for the late Mrs. Penson, his testatrix. The worthy old lady had died before the teeth could be affixed to her jaw, and the executor was already supplied by nature with an efficient array. The price of the teeth being £21, and there being no writing, the 17th section of the Statute of Frauds prevented the dentist from recovering for goods sold and delivered, but it was suggested that the count for work, labour, and materials might be sustained. This view, however, was not adopted, the rule being stated to be that *if the contract be such that when carried out it would result in the sale of a chattel*, the party cannot sue for work and labour.

Goods not in existence at the time of the contract, but which were to be made and delivered at a future time, were held not to be within the 17th section of the Statute of Frauds. Lord Tenterden's Act, 9 Geo. IV. however, brought them within the section, and contracts relating to such goods must now be in writing, just as much as those relating to goods already in existence. The great question, when such a contract has not been reduced to writing, is—Is this a contract for the sale of goods so as to be within the statute, or is it a contract for work and

labour, so that writing is unnecessary? On this constantly arising question *Lee v. Griffin* is an important authority, and must be carefully distinguished from *Clay v. Yates*, where it was held that an agreement by a printer to print a book, altho' it involved finding materials, was not within the statute, and need not be in writing. At one time it was thought that the test to be applied to such cases was whether the value of the work exceeded the value of the materials; but that rule seems to have now yielded to that laid down in *Lee v. Griffin*.

See, however, Add. Contr., 7th ed., p. 656.

Contract contained in several Documents, &c.

[19.]

BOYDELL v. DRUMMOND.

[11 EAST.]

Towards the end of the last century Boydell & Co., a great publishing firm in London, determined, with a view to the encouragement of literature and their own remuneration, to bring out a series of engravings of scenes in Shakespeare's plays; and so they issued a prospectus and began vigorously canvassing for subscribers. There were to be 72 engravings altogether, four of which were to constitute a number, and at least one number was to be published every year. "The proprietors, however, were confident that they should be able to produce two numbers in the course of every year." The price of each number was three guineas. The student, whose *forte* is arithmetic, will thus perceive that the whole series would not be completed for nine years, and that the total cost would be 54 guineas.

Amongst other enthusiastic, if not very appreciative, admirers of William the Great was a Mr. Drummond. He agreed to become a subscriber, and signed his name in a book bearing the title, "Shakspeare Subscribers, their Signatures." He even put his admiration of our dramatist to the still severer test of accepting and actually paying for

one or two of the numbers. But his interest soon began to languish, and at last it became necessary to sue him for not accepting the remainder of the engravings. In defence, Mr. Drummond availed himself of the Statute of Frauds. He said that the agreement he had entered into was one which, by its terms, was incapable of performance within a year from the making, and therefore, to bind him, should have been in writing. The publishers replied to this—

1stly. That, Mr. Drummond having taken and paid for several numbers, there was sufficient “performance” to satisfy the statute, if not Mr. Drummond’s conscience.

2ndly. That, after all, the agreement *was* in writing, for the book in which Mr. Drummond had signed his name, coupled with the publishers’ prospectus, constituted a sufficient memorandum of agreement.

It was held, however,—scarcely to the execution of justice and the maintenance of truth,—

1stly. That part performance would not do, for the word “*performance*” could not mean anything less than *completion*.

2ndly. That, there being no means of connecting the Shakspeare subscribers’ book with the prospectus, without oral evidence—no reference being made by the one to the other—they did not together constitute a sufficient memorandum.

“If,” said Le Blanc, J., “there had been anything in that book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same with that of the prospectus, it might, perhaps, have done; but as the signature now stands without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time to which the signature related: the case, therefore, falls directly within this branch of the Statute of Frauds.”

So Drummond beat the publishers, and lived happily to the end of his days.

This case is the leading authority for the position that, tho' a contract may be collected from several documents, those documents must be *so connected in sense that oral evidence is unnecessary* to show their connection—in other words, they must be left to speak for themselves.

"The statute," said Cranworth, C., in an important case, "is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Thus, a contract to grant a lease on certain specified terms is of course good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the case I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but only in order to show what the writing is which is referred to. When that fact, which, it is to be observed, is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing, signed by the party."

Ridgway v.
Wharton,
3 D. M.
& G.

In a very recent case, in which a person had broken a contract to sell some land at Hammersmith to a builder, it was held that an imperfect and irregular document, purporting to be an agreement by the builder to purchase and pay a deposit, was sufficiently connected with a receipt for the deposit which the seller had signed, to form a binding agreement.

Long v.
Millar,
41 L. T.,
N. S.

Boydell v. Drummond should also be remembered by the student as an illustration of the clause in the 4th section of the Statute of Frauds, which says that an "agreement that is not to be performed within the space of one year from the making thereof" must be in writing.

On the effect of part performance, the student should refer to the equity leading case of *Lester v. Foxcroft*. Courts of equity have long been in the habit, when the nature of the case was such as seemed to require equitable interference, of decreeing specific performance of agreements void at law by reason of the 4th section of the Statute of Frauds.

Written Contracts and Oral Evidence.

GOSS v. NUGENT.

[20.]

[5 B. & AD.]

Lord Nugent agreed to buy of Mr. Goss several lots of land for £450, and paid a deposit of £80, Mr. Goss undertaking to make a good title to all the lots. This agreement was, as the Statute of Frauds requires all agreements relating to land to be, in writing. Soon afterwards Mr. Goss found that as to one of the lots he could not make a good title; and of course Lord Nugent would then have been perfectly justified in crying off the bargain. Instead of doing so, he agreed orally to waive the necessity of a good title being made as to that lot. Afterwards, however, his lordship seems to have altered his opinion as to the desirability of becoming the owner of the land, and he declined to pay the remainder of the purchase-money, relying on the objection to the title. In answer to that, Mr. Goss wished to prove that after Lord Nugent knew about the defect of the title he agreed to waive it. This, however, was not allowed. So Lord Nugent recovered his deposit, and got the better of Mr. Goss.

The rule that a written contract cannot be varied by parol is subject to one or two exceptions. Supposing the contract to be one which, tho' it *is* in writing, need not have been, it may be varied by parol evidence of what took place between the parties *after* the date of the agreement. And tho' the general rule is that parol evidence of what took place between the parties *previously* to or *contemporaneously* with the written agreement is quite inadmissible, such evidence may, nevertheless, be given to show that the execution of the written agreement was conditional on some event happening; in fact, that a document purporting to be a final and absolute contract purports to be what it is not. In a case decided about 20 years ago it appeared *Pym v. Campbell*, that the defendants had orally agreed to buy from the plaintiff three

6 E. & B.
See also
Wallis v.
Littell,
31 L. J.
C. P.

eightth parts of the benefits to accrue from an invention of the plaintiffs." It was agreed that this purchase was only to be made if an engineer, named Abernethie, approved of the invention. They then made a written memorandum of the agreement without putting down the condition about Mr. Abernethie's approval. Mr. Abernethie did *not* approve; and the question was whether the condition could be proved by oral evidence. In giving judgment that the evidence was admissible, Erle, C.J., said, "The point made is that this is a written agreement absolute on the face of it, and that evidence was admitted to show it was conditional; and, if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. . . . The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but *evidence to shew that there is not an agreement at all is admissible.*"

An important distinction as to when oral evidence can be given to affect a written instrument, and when it cannot, is between a *latent* and a *patent* ambiguity. A *latent* ambiguity is not apparent on the face of the instrument. The document seems to the stranger reading it to be plain and simple enough; but, really, there are two states of fact equally answering to the instrument. To correct such an ambiguity, and show what was intended, parol evidence is admissible. But parol evidence cannot be given to correct a *patent* ambiguity. Thus, in a case where a bill of exchange had been drawn for "two hundred pounds," but the figures at the top were "£245," and the stamp corresponded to the higher amount, evidence was not admitted to show that £245 was really the sum intended.

Saunderson v.
Piper, 5
Bing. N.C.

There are other cases in which parol evidence may be given; for example, to show the situation of the parties, to prove fraud, to bring in usage of trade, to identify the subject-matter, to introduce a principal not named in the contract, or to prove an agreement on some collateral matter.

An apparent exception to the rule exists in the case of a contract made partly in writing and partly by parol. The reason why oral evidence is admissible here is that there is really no complete contract in writing between the parties. A cattle dealer a few years ago wanted to send some cattle from Guildford to the Islington market. They told him at Guildford Station that the beasts would be duly forwarded to King's Cross; but they inveigled him into the signing of a consignment note by which the cattle were directed to be taken to the Nine Elms Station, which of course was not so far as the cattle dealer expected them to go. At this intermediate station they remained, and suffered injury from not being fed properly, &c. The company's point was that the consignment note was conclusive evidence of the terms of the contract, and, therefore, that they had never undertaken to carry

further than the Nine Elms Station. But for the cattle dealer it was successfully contended that the consignment note did not constitute a complete contract, and that parol evidence could be given of the conversation that had taken place between the plaintiff and the company's servants before the consignment note was signed.

Tho' parol evidence may rarely be given to *vary* a written contract, it may generally be given to *rescind* it altogether. And the better opinion is that this is so even where the contract is one of those which are compelled by statute to be in writing.

Malpas v.
L. & S. W.
Ry. Co.,
L. R. 1
C. P.

Written Contracts and Evidence of Usage.

WIGGLESWORTH *v.* DALLISON.

[21.]

[1 DouG. & S. L. C.]

Wigglesworth was, as his bucolic name alone might show, a farmer. By lease dated March 2nd, 1753, one of the Dallison family let him have a field in Lincolnshire for 21 years. In the last year of his tenancy, tho' he knew that he had to give up the land almost immediately, he sowed his field with corn. In doing what might seem at first sight a rash and improvident act, Mr. Wigglesworth was relying on a certain local custom, which entitled an outgoing tenant of lands to his way-going crop, that is, to the corn left standing and growing at the expiration of the lease. Dallison's answer to this claim was that, if any such custom existed at all, it had no application to the present case where the terms between landlord and tenant had been carefully drawn up in a lease by deed, and no mention made therein of any custom. The court, however, decided in favour of the custom, Lord Mansfield remarking that, while it was just and reasonable and for the benefit of agriculture, it did not alter or contradict the agreement in the lease, but only superadded a right.

Parol evidence of the custom of a particular place or trade cannot be given to *vary* a written contract. If the terms of the contract are perfectly clear and exhaustive (and whether they are so is for the court, not for the jury, to decide), the maxim *expressum facit cessare tacitum* has full application. In one case it appeared that by the custom of the country the outgoing tenant was entitled to an allowance for foldage from the incoming tenant. This, therefore, if the lease had been silent on the subject, would have had to be paid. But the lease was *not* silent. It particularly specified the payments which were to be made by the incoming to the outgoing tenant, *and amongst them it did not mention any payment in respect of foldage*. It was held, therefore, that the terms of the lease were perfectly clear, and excluded the custom.

Webb v. Plummer,
2 B. & Ald.

So, too, in mercantile contracts. If you insure a ship and cargo for a voyage, and the terms of the policy are that "the insurance on the ship shall continue till she is moored 24 hours, *and on the goods till safely landed*," and your ship reaches her haven, and has been moored the 24 hours, and then afterwards, and *before being landed*, the goods are lost, the insurance people will not be allowed to cheat you by showing a custom that the risk *on the goods as well as on the ship* expires in 24 hours: you expressly stipulated that ship and cargo should stand on different footings. Similarly, when a gentleman in the pig-trade sold what he warranted to be "prime singed bacon," but which proved to be neither palatable nor fragrant, he was not permitted to turn round and produce a convenient custom in his trade to the effect that "prime singed bacon" is prime singed bacon none the less because it happens to be very much tainted.

Parkinson v. Collier,
Park Ins.,
7th ed.,
470.

Yates v. Pym,
6 Taunt.

But tho' a written contract cannot be *varied* by evidence of the custom of a particular trade or place, it may be *explained* thereby, and it may have *incidents annexed*.

Uhde v. Walters,
3 Camp.
Hutchinson v. Bowker, 5 M. & W.

Smith v. Wilson,
3 B. & Ald.

Grant v. Maddox,
15 M. & W.
E. B. & E.;
and see
Hutchinson v.

1. It may be "*explained*." Evidence has been admitted to show that the Gulf of Finland, tho' not geographically so, is always considered by merchants as part of the Baltic, that "good barley" and "fine barley" are different things, that 1000 rabbits means 1200, and that, when a young lady was engaged as an actress for "three years," the three years meant only the theatrical season of those years.

2. *Incidents* may be *annexed*. The leading case is an excellent illustration here. So is *Humfrey v. Dale*, where it was held that a person who had professed to contract as agent might by custom be treated as principal. The principle on which incidents are allowed to be annexed to written contracts is that the parties "did not mean to express in writing the whole of the contract by which they intended to be bound," but to contract with reference to certain known usages.

Except when the mode of dealing is that of a particular house, such as Lloyd's (in which case he must be proved to have been acquainted

with it), a man is bound by the usages of the place or trade with *Tatham*, which his contract has to do, and his ignorance of those usages is L. R. 8 immaterial. A man, for instance, who employs a broker on the C. P. Stock Exchange is bound by the usages of the Stock Exchange; and *Giabay v. Lloyd*, a man in London who authorises another to contract for him at 3 B. & C. Liverpool is bound by the Liverpool usages. *Sutton v. Tatham*, 10 A. & E., and *Bay-liffe v. Butterworth*, 1 Ex.

To make a particular custom good it must be—

1. immemorial,
2. continued,
3. peaceable,
4. reasonable,
5. certain,
6. compulsory,
7. not inconsistent.

Reasonableness is a question of law for the court. In *Hall v. Nottingham* it was held that a custom for the inhabitants of a parish 1 Ex. Div. to enter on a person's field, put up a maypole, dance, play at kiss in the ring, and otherwise enjoy themselves, at any times in the year, in defiance of the proprietor, was good. But in a still more recent case it was held that a custom that an outgoing tenant should look, not to the landlord, but to the incoming tenant, for payment for seeds, tillages, &c., could not be supported, as being "unreasonable, uncertain, and prejudicial to the interests, both of landlords and tenants."

Bradburn v. Foley,
3 C. P. D.

Bailments.

COGGS v. BERNARD.

[22.]

[2 LD. RAYM. & S. L. C.]

Coggs wanted several hogsheads of brandy to be removed from one London cellar to another. Instead of employing a regular porter to do the job, he accepted the gratuitous services of his friend Bernard, who undertook to effect the removal safely and securely. But the amateur did his work so clumsily that one of the casks was staved, and the street streamed with good sound brandy in a way that (unless he was afflicted with Good Templarism) would have done Dick Whittington's heart good to see. Coggs, how-

ever, was not pleased. He was an austere man ; and, as he successfully maintained an action against Bernard, probably that gentleman never again volunteered rash acts of friendship.

[23.]

WILSON v. BRETT.

[11 M. & W.]

Mr. Wilson had a horse to dispose of, and in one Mr. Margetson believed himself to have an intending purchaser. He knew Brett to be an excellent rider, and one who could show off the points of a horse to advantage. So he asked him, as a great favour, to ride the horse over to Peckham, and show it to Mr. Margetson. Brett, with his usual readiness to oblige his friends, set off accordingly, and found Margetson indulging in the innocent pastime of cricket, undeterred by the fact that the turf was exceedingly wet and slippery. The cricketers left their game, and admired the horse. But unfortunately, while Brett was endeavouring to witch them with his noble horsemanship, he let the horse down, and disastrous was the fall thereof. This was an action against him by the owner of the horse. There was no doubt Brett had been to a certain extent negligent. He had not displayed that skill which might have been fairly expected from so brilliant a rider. But he had been riding the horse, not as a hired jockey, but out of love for his friend ; and he contended that, being therefore nothing more than a gratuitous bailee of the chattel entrusted to him, he could not be made liable for anything short of, what was not imputed to him, *gross negligence*. This plausible contention did not prevail, for the judges held that *a gratuitous bailee who has skill must use it*.

Coggs v. Bernard is the great case on bailments.

A bailment is a delivery of a thing in trust for some special

purpose ; the person who delivers it being called the bailor, and the person to whom it is delivered the bailee.

Lord Holt divides bailments into six kinds :—*depositum*, *mandatum*, *commodatum*, *vadium*, *locatio rei*, and *locatio operis faciendi*. But it is better to begin with this classification of bailments,

1. For the benefit of the bailor alone,
2. For the benefit of the bailee alone,
3. For the mutual benefit of bailor and bailee,

and to bring *depositum* and co. under these heads.

1. Under the first head come *depositum* and *mandatum*.

Depositum—the delivery of goods to be taken care of for the bailor without the bailee receiving anything for his trouble : e.g., I ask my friend Brown to hold my watch while I am playing cricket.

The depositary is responsible only for gross negligence. If my friend takes a moderate amount of care of my watch, he will not be obliged to give me a new one if it is stolen, or lost, or broken. But, on the other hand, if the depositary has been grossly negligent he cannot defend himself by showing that he has lost his own things with the bailor's. A gentleman once "deposited" some money with a coffee-house keeper. The next morning the gentleman asked for it ; but the coffee-house keeper said he had left it, *with his own money*, in the public room down stairs, and it had all disappeared. The coffee-house keeper was clearly guilty of gross negligence in leaving money in a place to which the most inexperienced thief had easy access, and the fact that his own money had gone too only made him a greater donkey still.

*Doorman
v. Jenkins,
2 Ad. & E.*

The bailor must exercise a certain amount of vigilance in the selection of his bailee. If I were to entrust my watch to an idiot, or a little girl, no amount of gross negligence on their part would give me a remedy against them. I must bear the consequences of my folly.

As a rule, the depositary may not make use of the thing deposited. But, if no harm would come thereby, he may. My friend of the cricket-field might draw the dial from his pocket occasionally to tell the time ; or if I were to "deposit" my grey mare with him, he not only may but ought to give her proper exercise.

It is not at present settled how far a depositary may add to his responsibility by inserting special terms in his promise to his bailor. If, however, the bailee has spontaneously offered to take care of the goods, he is responsible not merely for gross, but for ordinary negligence.

Mandatum—the delivery of goods to be done something with for the bailor without the bailee receiving anything for his trouble : e.g., I ask my friend Jones to post a letter for me.

As in *depositum*, (and *mandatum* is only a kind of superior

depositum;) the bailee is liable for gross negligence only. The contract between Mr. Cogg's and Mr. Bernard was one of *mandatum*, tho' it is to be observed that Mr. Bernard laid additional responsibility on his shoulders by undertaking to effect the removal "safely."

The rule, however, that a mandatory is responsible for gross negligence only is to some extent qualified by the maxim *spondes peritiam artis*. It is stated in the text that gross negligence was not imputed to Mr. Brett. This is only literally true. What is ordinary negligence in one man is gross negligence in another; and the omission by a person endowed with skill to make use of that skill is really nothing short of gross negligence. In this view *Wilson v. Brett* is no exception to the rule that a gratuitous bailee is responsible only for gross negligence: Brett was constructively guilty of gross negligence.

To take a further illustration of *spondes peritiam artis*, if a young doctor, out of charity, attends a poor person, and makes a hash of the case and his patient, that young doctor is liable to an action. It is *mandatum*, but his position presumes skill.

Shiells v.
Black-
burne,
1 H. Bl.

Of gratuitous bailments it is to be remarked that no action can be brought on a promise to enter on one of them: for for such promise there is no consideration. But if the man ascends from words to deeds, and actually sets about the business, he then becomes responsible for gross negligence. If a statement of claim set forth that the defendant agreed to repair a house, and didn't do it, there would be no ground of action apparent: but if it said that the defendant agreed to repair a house, and began to do it, *and did it badly*, there would be plenty. In the one case there would be no consideration for the defendant's promise; in the other the trust reposed in him by the bailor, who allowed him to enter on the work, would be a sufficient consideration.

Elsce v.
Gatward,
5 T. R.

2. Under this head (for the benefit of the bailee alone) comes *commodatum*.

Commodatum—the *lending* of a thing to be returned just as it is: e.g., I lend my grey mare to Jones to ride to the meet on; I don't expect him to return me another grey mare, but the same identical old 'oss that I lend him. (Note.—If I expected a borrower to return me not the identical things but similar, e.g., if I lend him half a dozen postage stamps, or five shillings, it would not be *commodatum* but *mutuum*.)

Commodatum being a contract in which the only person benefited is the bailee, that gentleman is responsible even for *slight* negligence; the more so as by the fact of borrowing he may be taken to have represented himself to the lender as a fit and proper person to be entrusted with a valuable article.

The commodatory must strictly pursue the terms of the loan. If I borrow a horse or a book to ride or to read myself, I have no business to allow anybody else to ride or read. If the horse is lent for the highway, I must not take it along dangerous bridle paths. The bailee must redeliver the chattel, when the time has expired, just as it was, reasonable wear and tear excepted. He is not responsible, however, if the article perishes by inevitable accident, or by its being stolen from him without any fault of his. *Bringloe v Morrice*, 1 Mod.

The bailor must disclose defects of which he is aware, as for instance that the gun he lends his friend Brown is more likely than not to burst and blow his hand off. "Would it not be monstrous," said Coleridge, J., in *Blakemore v. Bristol and Exeter Railway Company*, "to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him; and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible?" The reader will echo, "monstrous!" 8 E. & B.

The commodatory has no lien on the thing lent for antecedent debts due to him; nor, of course, can he keep it till the bailor pays the necessary expenses he has been put to in the keeping of it.

3. Under the last head (for the mutual benefit of bailor and bailee) come *vadium*, *locatio rei*, and *locatio operis*.

(1). *Vadium* (otherwise known as *pignori acceptum*)—the contract of pawn. We will hope the student is not frequently the bailor here.

The benefit being mutual, the degree of diligence required of the bailee is "ordinary." If in spite of due diligence the chattel is lost while in the pawnee's keeping, he may still sue the pawnor for the amount of his debt.

The effect of the contract of pawn is not (like that of a mortgage of personalty) to pass the property in the chattel to the bailee; nor, on the other hand, is it (like that of a lien) merely to give him a hostage, but it gives him such a special property in the thing pawned as enables him, if the pawnor makes default, to sell it and pay himself; the surplus being of course handed back to the pawnor. As a rule, the pawnee may not make use of the thing bailed to him. If, however, it is an article which cannot be the worse for the user,—jewellery, for instance,—he may; but in such a case he would be responsible for the loss, however it happened. Moreover, if the pawn be of such a nature that the pawnee is put to expense to keep it, e.g., if it be a horse or a cow, the pawnee may make use of it,—riding the horse, or milking the cow,—as a recompense for the cost of maintenance. *Donald v. Suckling*, L. R. 1 Q. B.

Such are some of the common law rules as to *vadium*; and they apply now to cases where the sum lent exceeds £10. But when the sum lent by way of *vadium* is less than £10, the Pawnbrokers Act,

35 & 36 1872, applies. That Act provides that every pledge must be redeemed
 Vict. c. 93. within twelve months (with seven days' grace). If it is not redeemed
 within twelve months, what becomes of it depends on whether the
 loan was for more or less than 10s. If it was for 10s. or less, it then
 becomes the pawnbroker's absolute property; if it was for more, he
 may sell it, but must hand over the surplus, after satisfaction of his
 debt and interest, to the pawnor. The pawnbroker is now absolutely
 liable for loss by fire, and should protect himself by insuring. He is
 liable, too, for any injury done to the thing pawned while in his keeping.

(2). *Locatio rei*—the everyday contract of the hiring of goods.

This being a mutual benefit bailment the degree of negligence for
 which the hirer is answerable is "ordinary." The hirer of a horse
 once physicked it himself, instead of calling in a "vet." He pre-
 scribed "a stimulating dose of opium and ginger," and of course
 the animal "soon after taking it died in great agony." On the ground
 that the hirer had not exercised "that degree of care which might be
 expected from a prudent man towards his own horse" he was held
 liable to the owner of the horse.

Deane v.
Keate,
 3 Camp.

(3). *Locatio operis faciendi*—when the bailee is to bestow labour
 on or about the thing bailed and to be paid for such labour.

Generally speaking, the rule as to diligence is the same as in
vadium and *locatio rei*; but when the bailee is a person exercising a
 public employment, *e.g.*, a carrier or an innkeeper, he is required to
 exert much greater circumspection. In fact a common carrier is an
 insurer, being responsible for loss by any cause except the act of God
 and the king's enemies. An instructive case as to the liability of a
 bailee of this class (not being an innkeeper or a carrier) is *Searle v.*
Laverick, where a man had entrusted his carriage to the care of a
 livery-stable keeper. It was held that the latter was not responsible
 for damage done to the carriage by the falling of a newly-erected
 shed through the negligence of the contractor who had erected it, the
 livery-stable keeper having been properly careful in the selection of
 such contractor.

L. R. 9
 Q. B.

As to the right to maintain trover, it may be remarked that in
vadium and *locatio rei* it is only the bailee who can do so; for in
 either of those contracts he can exclude the bailor from the posses-
 sion. But in the other kinds of bailment either bailor or bailee may
 sue, tho' the recovery of damages by either deprives the other of his
 right of action.

The terms "gross negligence," "ordinary negligence," &c., have
 been freely used in speaking of these bailments. Many eminent
 lawyers, however, think that there are really no degrees of negligence,
 and that, as Rolfe, B. (afterwards Lord Cranworth), said in *Wilson v.*
Brett, negligence and gross negligence are "the same thing, with the
 addition of a vituperative epithet."

Liability of Innkeepers.

CALYE'S CASE.

[24.]

[8 COKE & S. L. C.]

A lated traveller gained his timely inn, and dismounting from his fiery steed bade mine host send it out to pasture. The landlord, accordingly, sent it into a field ; but, when its master wished to resume his journey, it was nowhere to be found. The owner now tried to make out that the landlord was responsible. But it was held that he was not, for the horse had been sent into the field at the express desire of the guest.

The liability of innkeepers, like that of common carriers, probably has its origin in their readiness to collude with the knights of the road and the other ornaments of the days when the age of chivalry had not yielded to the age of sophisters, calculators, and muffs. That liability was at common law very great. They were not indeed responsible for losses arising by extraordinary commotions of nature or by the pillaging of invaders,—in technical language, by the act of God or the king's enemies,—but they were responsible for all other losses, and it did not make the slightest difference whether they had been negligent or not. This, however, was not more than a very strong presumption. If the landlord could show clearly that it was by the guest's own fault that the loss arose, he rebutted the presumption of liability. But the loss was *primâ facie* evidence of liability.

In 1863, however,—when the race of highwaymen had not for some time been displaying their former industry,—the liability of innkeepers was greatly restricted, and by the Act then passed they are never bound to pay more than £30, except in the following cases :—

26 & 27
Vict. c. 41.

1. Where the article which the landlord has lost is "a horse, or other live animal, or any gear appertaining thereto, or any carriage."
2. Where it can be shown that he did not take proper care of the article. ("Wilful act, default, or neglect" are the words.)
3. Where the article is expressly deposited with him for safe custody.

But mine host is not to be entitled to the benefit of this Act unless he posts up a printed copy of sect. 1 in a conspicuous part of his entrance-hall, and he had better take care not to omit material parts of the section, or play other pranks with the Act, for the courts

have shown clearly that they do not intend to allow innkeepers to trifle with it. In a recent case it appeared that the landlord of the "Old Ship" at Brighton had posted up what purported to be a copy of sect. 1. But through some mistake the word "act" was left out, so that the sentence had "wilful default or neglect" instead of "wilful act, default, or neglect." A gentleman staying at the hotel had his watch and things stolen during the night, and went to law with the landlord to recover their value. The innkeeper paid £30 into court, but said that the Act protected him against any further claim. But it was held that, as he had not posted up a correct copy of sect. 1, he was not entitled to the benefit of the Act.

Spice v.
Bacon,
2 Ex. Div.

Supposing the innkeeper not to have complied with the conditions of this Act, his liability remains the same as at common law. In that event almost his only defence is (as above stated) to show that his guest has been negligent. He must show it, too, very plainly. A gentleman some years ago (it was before 1863) slept one night at the Great Northern Hotel at King's Cross. Before getting into bed he divested himself of his watch and other valuables, and placed them on a slab by his pillow. But he "forgot to bar the door, O," and in the morning they were gone. There was no negligence on the part of the hotel people. They had put up notices about the frequency of robberies in good hotels, and recommending travellers to lock their doors. But this diligence stood them in no stead, for

Morgan v.
Ravey,
6 H. & N.

they were held liable to a man who forgot to lock his door. In a subsequent and very similar case, too, it was said by one of the judges—"I agree that there is no obligation on a guest at an inn to lock his bed-room door. Tho' it is a precaution which a prudent man would take, I am far from saying that the omission to do so

Oppenheim
v. White
Lion Hotel
Co., L. R.
6 C. P.
41 & 42
Vict. c. 38.

alone would relieve the innkeeper from his ordinary responsibility." If a guest after taking his ease in his inn refuses to pay the reckoning, the landlord has a lien on the luggage and belongings which he has brought into the inn, whether they are the man's own or not, and if the bill is not settled in six weeks, may sell them. But he may not detain the person of his guest.

It was said in Calye's case that if the landlord had sent the horse into the field without his guest's authority he would have been responsible. Such a case has actually occurred. A Bewdley innkeeper whose coach-house was full,—it being fair day,—put a guest's gig into the adjoining street without saying a word to him on the subject. The gig was stolen, and the owner sued the innkeeper, who was held liable on the ground that he had chosen to treat the street as part of his inn.

Jones v.
Tyler,
1 A. & E.

An inn has been defined as "a house where the traveller is furnished with everything he has occasion for while on his way." A coffee-house is not such a place; nor is a boarding-house; and it

has lately been decided, in a case in which a man had insisted on entering accompanied by an offensive dog, that a refreshment bar attached to an inn is not. Any man who is ready to pay for his accommodation, and conducts himself properly, can claim admission into an inn, if there is room, at any hour of the day or night; and, if the landlord refuses it, an action lies against him, or he can be indicted.

R. v. Rymer,
2 Q. B. D.
Pell v. Knight,
8 M. & W.,
and *R. v. Teens*,
7 C. & P.

“Proper Vice.”

BLOWER v. GREAT WESTERN RAILWAY CO.

[25.]

[L. R. 7 C. P.]

Mr. Blower had a bullock which he wanted to send by railway from a small station near Monmouth to Northampton. The beast was duly loaded to Mr. Blower's satisfaction in one of the Great Western Railway Company's trucks, and might have been as much expected as hoped to reach its destination right side up. But however much the arrangements were to the satisfaction of Mr. Blower, they do not seem to have met the approval of the bullock, which in the course of the journey, by the exercise of unsuspected agility, succeeded in escaping and getting killed on the line. Admitting that the company had not been at all negligent in the carrying of the animal, were they not liable as common carriers? No; for the disaster was due to the natural playfulness, or, in sterner language, the “inherent vice” of the subject of bailment.

The effect of this case is practically to introduce a third exception to the rule that common carriers are insurers. They are to be excused, not only when the loss has been occasioned by the act of God or by Her Majesty's enemies, but also if it has happened by the *inherent defect* of the thing carried. Two or three years ago the defendant, a common carrier by sea from London to Aberdeen, received from the plaintiff a mare to be carried to Aberdeen for hire. On the voyage the mare was injured so badly that she died, partly

*Nugent v.
Smith,*
L. R. 1
C. P. D.

from the exceedingly rough weather, and partly from her own fright and struggling. It was held that under these circumstances the defendant was not liable. In the case referred to the expression "act of God" was thoroughly discussed. "The principle," said Mellish, L.J., "seems to me to be that a carrier does not insure against acts of nature, and does not insure against defects in the thing carried itself, but in order to make out a defence the carrier must be able to prove that either cause taken separately, or both taken together, formed the sole and direct and irresistible cause of the loss. I think, however, that, in order to prove that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented."

*Farrant v.
Barnes,* 11
C. B., N.S.
29 & 30
Vict. c. 69,
s. 6.

It may be remarked here that a person who delivers a dangerous substance to a common carrier, without giving him any information about it, is responsible for all the evil consequences which may arise therefrom. It has been expressly provided by Act of Parliament that a carrier is not bound to receive such substances.

Special Contracts by Carriers.

[26.] **PEEK v. NORTH STAFFORDSHIRE RAILWAY CO.**

[10 H. L. C.]

Mr. Peek, some score of years ago, lived at the interesting town of Stoke-upon-Trent. He wanted to send some marble chimney-pieces from there to London, and to get it done as cheaply as possible. With that view, he opened negotiations with an agent of the North Staffordshire Railway Company. The agent said the company would not be responsible for damage to the chimney-pieces unless the value was declared, and they were insured at the rate of 10 per cent. on the declared value. This rate Peek considered too high, and finally he sent a note to the agent requesting him to send the chimney-pieces "not insured."

The marbles received injury on the journey through

exposure to rain and wet, and Peek now sought to make the company responsible for the whole of the damage done.

The two chief questions were—

1. Whether the condition was “just and reasonable.”

2. Whether there was a “special contract signed;”

and both these questions were decided in the plaintiff's favour.

Before 1830 common carriers were accustomed to get rid of their common law liability as insurers of the goods committed to them by posting up notices. If it could be proved that the notice had come to the knowledge of the customer, it was presumed that he had assented to its terms, and the carrier was only liable in the case of wilful misfeasance or gross negligence. The efficacy of these public notices was destroyed in 1830 by the Land Carriers Act; but the Act reserved the carrier's right to make a special contract with his customer. The courts, however, were in many instances very hard on the customer, holding, for instance, that a notice put on a receipt given to a person delivering goods to be carried amounted to a special contract, and in 1854 further legislation was deemed to be necessary.

In that year was passed the Railway and Canal Traffic Act, which still permits the making of special contracts, but provides that no one shall be bound by any such contract unless he has signed it, and the condition imposed on him is “just and reasonable.”

The question whether a condition is “just and reasonable” is one for the judge at the trial, subject of course to the review of the divisional and higher courts. Amongst conditions that have been held to be just and reasonable may be mentioned one that a company shall not be liable for loss of market or other delay arising from detention, or another placing the carriage of such perishable goods as fish or fruit under special regulations. Of unjust and unreasonable conditions the condition in the leading case may be taken as a sample. So may a condition that a company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed. The question whether any particular condition is reasonable or not must, of course, usually depend on the special circumstances of the case.

The Regulation of Railways Act, 1868, extends sect. 7 of the Railway and Canal Traffic Act to the traffic carried on by railway companies on the sea. A case on this subject with which the student should make himself acquainted is *Cohen v. South Eastern Railway Co.*, where a lady coming from the continent lost her portmanteau through the clumsiness of the defendants' servants, who let it fall into the sea while taking it from the boat to the train.

11 Geo.
IV. & 1
Wm. IV.,
c. 68.

17 & 18
Vict. c. 31.

Sect. 7.

White v.
G. W. Ry.
Co., 2 C.
B., N. S.
Beal v.
South
Devon Ry.
Co., 3 H.
& C.

Simons v.
G. W. Ry.
Co., 18
C. B.

31 & 32
Vict. c. 199,
s. 16.
2 Ex. Div.

Land Carriers Act.

[27.]

MORRITT v. NORTH EASTERN RAILWAY CO.

[1 Q. B. D.]

Mr. Morritt was a passenger by the defendants' railway from York to Darlington, and had with him two water-colour drawings tied by a rope face to face. They were above the value of £10, but he made no declaration of their value. He handed them to the guard, asking him to take care of them, and saw them labelled "Darlington." When the train reached Darlington, Morritt got out, took a fresh ticket to Barnard Castle, and told the porter to see that the drawings were taken out and put into the Barnard Castle train. The drawings, however, were not taken out, but were carried on to Durham, and when Morritt saw them again they had been greatly injured, "holes having been made in them."

The question was, whether the Carriers Act applied to the case of goods negligently carried beyond the point of destination so as to protect the railway company, and it was held that it did. "The question to be determined by us," said Mellish, L.J., "is whether, if goods, such as pictures, within the protection of the Carriers Act, are handed to a carrier, and then by the negligence of the carrier are carried beyond the point of destination and injured, this is an injury within the meaning of the Act? I think it is. If not, the Carriers Act would really be no protection at all; for in the majority of cases of loss of or injury to goods, the fact is that the goods have not arrived at the station for which they were destined, but have been put out short of it or carried beyond it, and if the carrier is liable in such cases the protection of the Act would be reduced to nothing."

Sect. 1 of the Carriers Act provides that "no common carrier by land for hire shall be liable for the loss of or injury to . . . paintings, engravings, pictures, . . . contained in any parcel which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such articles contained in such parcel or package shall exceed £10, unless at the time of the delivery thereof . . . the value and nature of such articles shall have been declared by the person sending or delivering the same, and the increased charge, as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." It had been already decided that the Act protected the carrier from liability even for gross negligence, but it was urged in the leading case that it was no protection where the goods were being *carried by mistake*, and not as part of the intended journey. This view, however, as we have seen, was not adopted. It is to be observed, however, that the Carriers Act does not protect the carrier if he has been guilty of wilful misfeasance.

11 Geo. IV.
& 1 Will.
IV. c. 68.

Hinton v.
Dibbin,
2 Q. B.

Sect. 8 of the Carriers Act provides that a carrier shall be responsible for the felonious acts of his servants, altho' the customer may not have declared and insured his goods. As to the effect of this section it has been held that, while on the one hand the customer need not give evidence that would fix any particular servant with the theft, on the other it is not sufficient for him to show merely that nobody had a better opportunity of stealing his things than the company's servants.

Vaughton
v. L. & N.
W. Ry. Co.,
L. R. 9 Ex.

It has been recently held that the word "paintings" in the Act is to be taken in its ordinary sense to denote works of art of the Academy kind, and cannot be made to extend to rug and carpet designs, tho' painted by hand and highly artistic.

McQueen v.
G. W. Ry.
Co., L. R.
10 Q. B.

It is to be observed that tho' railway companies are common carriers, they are only bound to carry according to their public profession.

Woodward
v. L. & N.
W. Ry. Co.,
3 Ex. Div.
Johnson v.
Midl. Ry.
Co., 4 Ex.;
and see
Richardson
v. N. E. R.
Co., L. R.
7 C. P.

Passengers' Luggage.

BERGHEIM v. GREAT EASTERN RAILWAY CO.

[28.]

[3 C. P. D.]

Mr. Bergheim, one day a couple of years ago, was a passenger from Shoreditch to Yarmouth. When he arrived

at the Shoreditch station he found he had plenty of time, and so, by way of well employing the shining minutes, he decided to go to the refreshment room and get some lunch. First, however, he took his ticket, and made the acquaintance of an obsequious porter named Bishop, into whose care he committed his luggage, including a certain dressing-bag. Bishop said it would be all right, and went off with the luggage. He placed it on the seat of a first-class compartment, and locked it up. But when Mr. Bergheim had sufficiently refreshed, and went to his carriage, the bag was missing, and was never afterwards found. Mr. Bergheim now sought to make the company responsible for the loss of his dressing-bag. It was clear that the compartment, and not the luggage-van, was the proper place for such a bag, and that there had been no negligence on either side. The question, therefore, was whether the company were liable, as common carriers, in respect of the bag; and it was held that they were not.

L. R. 6
C. P.

Very much the same point had been decided in the previous and well known case of *Talley v. Great Western Railway Co.*, but Mr. Talley was guilty of negligence in not getting back to his carriage after taking his glass of beer at Swindon, whereas Mr. Bergheim acted with such prudence and circumspection as would not have discredited you or me. The principle seems to be that over luggage placed at his request or by his consent in the compartment he is travelling in the passenger is supposed to retain a kind of control, and not to have entirely confided it to the care of the company.

Tho' once doubtful, it may be said to be now quite clear that, in respect of luggage carried in the van, as distinguished from luggage carried in a compartment at the traveller's request, a railway company are liable as common carriers. Such luggage, however, must not be merchandise, but simply the personal luggage of the passenger. There are a number of cases, some of them running very fine, distinguishing "merchandise" from "personal luggage." The title-deeds of a client which a solicitor is taking to produce at a trial, the bedding which a man is carrying with a view to the time when he shall have provided himself with a home, the sketches of an artist, and a toy rocking-horse, have been held *not* to be personal luggage. There seems to be no satisfactory rule on the subject. Ten years ago a judge said, "The leading idea suggested by the words

Phelps v. L. & N. W. Ry. Co., 19 C. B., N.S.
Macrow v. G. W. Ry. Co., L. R. 6 Q. B.

'personal luggage' is something that may be carried in the hand." *Mytton v. M. Ry. Co., 4 H. & N. Hudston v. M. Ry. Co., L. R. 4 Q. B.*

In the title-deeds case above referred to, Erle, C. J., said, "It is impossible to draw a definite line. Luggage which one person might carry for his personal use might be a distress and annoyance to another. But still the habits of mankind must be considered to be within the cognizance of the railway company, so that anything carried according to usage for personal use would be a matter for which the company would be responsible as luggage of a traveller upon a journey. But *these* articles are entirely out of that category; they were not for the plaintiff's personal use, or usually required, but were taken by him in his capacity of attorney for the service of another person, and I think the defendants are not to be held responsible for them."

It is to be observed, however, that if the company are not deceived in the matter, but carry the goods without objection, tho' it is quite obvious that they are not personal luggage, they will be liable.

A company employing porters in the usual way are responsible for passengers' luggage, not merely while it is being carried on the railway journey, but also while it is in course of transmission from a cab to a train, or a train to a cab. There seems, however, to be a little doubt on the subject of luggage left on the platform, even tho' the porter may have taken charge of it. In regard to a passenger's luggage on the train's arriving at the station he gets out at, it has lately been laid down (in a case in which a lady's maid coming from Malvern lost her box at Paddington) that it is the company's duty to have the luggage ready at the usual place of delivery, while it is the passenger's duty to remove it within a reasonable time.

G. N. Ry. Co. v. Shepherd, 8 Exch.
Richards v. L., B. & S. C. Ry. Co., 7 C. B.
Lovell v. L., C. & D. Ry. Co., 45 L. J.; and Agrell v. L. & N. W. Ry. Co., 34 L. T.
Patscheider v. G. W. Ry. Co., 3 Ex Div.

Trains behind Time, &c.

DENTON v. GREAT NORTHERN RAILWAY CO.

[29.]

[5 E. & B.]

On the 25th of March, 1855, Mr. Denton, an engineer of some eminence, had occasion to go from Peterborough to Hull, where he had an appointment for the next morning. He consulted the company's time tables, and found there was a train leaving Peterborough at 7 p.m. which would land him at Hull about midnight. This just suited him,

so he took his ticket for Hull and started by it. But when he got to that uncomfortable looking station, where people change for Hull, Milford Junction, he was informed by an obliging official that the late train to Hull had been discontinued, and that he could not get there that night. The fact was, that the line from Milford Junction to Hull belonged to the North Eastern Railway Company, who till March 1st had run a train departing a few minutes after the arrival of the train leaving Peterborough at 7 p.m. But it had not run at all during March, and the Great Northern Railway Company had published their March time tables, tho' they had had notice that it would not run. In consequence of the absence of this train, Mr. Denton did not get to Hull in time to keep his appointment, and sustained damage to the amount of £5 10s., for which he sought to make the Great Northern Railway Company liable. He was quite successful. The company were held liable on the grounds—

1stly. That they had been guilty of a false representation. "It is all one," said Lord Campbell, "as if a person duly authorised by the company had, knowing it was not true, said to the plaintiff, 'There is a train from Milford Junction to Hull at that hour.' The plaintiff believes this, acts upon it, and sustains loss. It is well established law that where a person makes an untrue statement, knowing it to be untrue, to another, who is induced to act upon it, an action lies. The facts bring the present case within that rule."

2ndly. That the time tables amounted to a contract.

[30.] **LE BLANCHE v. LONDON & NORTH WESTERN RAILWAY CO.**

[1 C. P. D.]

Mr. Le Blanche was a business man, who, in August, 1874, like a great many other hard-worked individuals,

decided to spend a fortnight at Scarborough. He took a first-class ticket of the London and North Western Company to go from Liverpool to Scarborough by the 2 p.m. train, which, the time-tables told him, would arrive at Scarborough at 7.30 p.m. Mr. Le Blanche's journey lay by Leeds and York, at each of which places it was necessary for him to change and get into a train *not* belonging to the London and North Western Company. The train was 27 minutes late at Leeds, and, in consequence of that, Mr. Le Blanche missed the train he ought to have caught, and did not arrive at York till 7 o'clock, which was too late for the train on which arrived at Scarborough at 7.30. On inquiry, he was informed that the next train would leave York at 8 and get to Scarborough at 10. Most men under these circumstances would have spent an hour in dining, or looking at the old city. Not so Mr. Le Blanche. He instantly ordered a special train, and arrived at Scarborough at about half-past eight.

He now brought an action to recover the money he had paid for the special train,—nearly £12,—but in spite of the delay being traced to negligence, he did not get the money, because, tho' it is a sound principle of law that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be and charge him for the reasonable expense incurred in so doing, *yet he may not perform it unreasonably and oppressively*, and it was ridiculous for a man who was not the Prince of Wales and the rest of the Royal Family to take a special train merely for the purpose of getting to a nice place an hour earlier.

The duty of a carrier of passengers at common law is to deliver them at their destination within a reasonable time. If he does not do so, he is liable to an action by them.

But railway companies invariably issue time-tables and conditions so as to vary their common law liability. In Denton's case it was held that the time-tables amounted to a representation, so that if

it was a false representation an action of deceit could be brought. On the whole, too, the judges thought that the time-tables amounted to a contract with the passenger who read and acted on them.

The usual condition which the companies seek to enforce is that "tho' every attention will be paid to ensure punctuality, they do not warrant the departure or arrival of the trains at the times specified in the time bills;" and the meaning of this and similar conditions is frequently discussed. On the whole it is clear that a company cannot contract itself out of its liability to be reasonably punctual. But, on the other hand, it is not to be held liable merely because a train is late. It must be affirmatively shown that the lateness is due to neglect to pay the "every attention" which is promised. No doubt the extreme lateness of a train would raise a presumption of such negligence, but it would be open to the company to rebut it by showing that it was due to a fog, or the slippery state of the rails, or to some circumstance over which they had no control.

Assuming that an action lies, there is a further question as to the damages obtainable. It is clear that damages cannot be obtained for the loss of a business engagement, such loss not being in the contemplation of both parties at the time of contracting. Nor can damages be obtained for annoyance of mind or illness consequent on the train's lateness. But damages can be obtained for physical inconvenience, the having to walk, for instance, six miles on a wet night. Moreover, on the principle that when a contracting party fails to perform his engagement the other may perform it for himself and send in his bill, provided he does not perform it oppressively and unreasonably, the passenger may take a carriage or special train and charge it to the company. A rough test that might be applied as to the oppressiveness is—supposing this gentleman had had to pay the money out of his own pocket, would he have taken the special train? If the answer to this question is "Yes" it does not matter in the least whether the plaintiff's engagement was one of business or of pleasure. Whether he be a learned counsel hurrying to the defence of a murderer, or a cricketer who has promised to play in an important match, the liability of the company is the same (*a*). Some of the cases referred to in this note have lately received elaborate discussion at the hands of the Irish Court of Appeal in a case in which a railway company had failed to provide horse-boxes, and the horses, tho' not quite in a fit condition, had had to make a long and fatiguing journey by road. It was held that "the measure of damages was the

Hamlin v.
G. N. Ry.
Co.,
1 H. & N.
Hobbs v.
L. & S. W.
Ry. Co.,
L. R. 10
Q. B.

(*a*) It is submitted that this is a correct deduction from the *Le Blanche* case, tho' we should scarcely be prepared to advise a gallant "Incog." or gay "Reveller" to go to law under such circumstances.

deterioration which the horses, if in ordinary condition and fit to make the journey, would have suffered thereby, and the time and labour expended on the road."

Waller v.
Midland,
&c., Ry.
Co., L. R.
I., vol. 4.

Power of Wife to Bind Husband to her Contracts.

MANBY v. SCOTT.

[31.]

[1 SID. & S. L. C.]

Sir Edward Scott, a respectable baronet of the seventeenth century, was not fortunate in his choice of a wife. The lady was fast, and the gentleman was slow; and they failed to hit it off together. Probably, therefore, it was to the no small relief and satisfaction of the worthy baronet when Dame Scott, as the reporters call her ladyship, determined to seek fresh woods and pastures new, and went right away. The good easy man had not enjoyed such peace since the days of his bachelorhood. Twelve years passed away, and one day at the stately home of England inhabited by Sir Edward Scott there turned up an exceedingly seedy looking female who announced herself as Lady Scott and the mistress of all she surveyed. Her rights, however, were very soon disputed. The baronet was a sensible person, and his pampered menials soon sent the old woman about her business.

This action was brought by a draper who, altho' Sir Edward had expressly told him not to do so, had supplied Lady Scott with silks and satins during the time she was living away from her husband. The reader will scarcely be surprised to hear that Mr. Manby did not obtain a satisfactory settlement of his little bill, and *Manby v. Scott* is the chief authority for the principle that the wife's contract does not bind the husband unless she act by his authority.

[32.]

MONTAGU v. BENEDICT.

[3 B. & C. & S. L. C.]

Mr. Benedict (the name is a fancy one) was a hard-working lawyer, whose wife ordered various articles of expensive jewellery from the plaintiff without her husband's knowledge. In an action by the jeweller against the husband it was argued for the plaintiff with some plausibility that the defendant and his wife were in comfortable circumstances of life; there was no *res angusta domi*, tho' they might not be rich; and that cohabitation was evidence of Benedict's assent to his wife's contract. It was, however, unanimously held that the goods supplied were *not necessities*, and that therefore the defendant could not be compelled to pay for them.

[33.]

SEATON v. BENEDICT.

[5 BING. & S. L. C.]

Mr. and Mrs. Benedict reappear on the boards. After the little affair of the jewellery, they left town and went to live at Twickenham. But even in the seclusion of that peaceful hamlet Mrs. Benedict pursued her extravagant ways. She became indebted to a local haberdasher for scarves, gloves, laces, and other articles that ladies wear and gentlemen ought to know nothing about; and finally the tradesman sued her husband.

The goods supplied were unquestionably necessities, but then Mr. Benedict had always duly furnished his wife with necessary apparel, and knew nothing of her clandestine dealings with Seaton; and on this ground the plaintiff was disappointed in his expectations of getting paid. "It may be hard," said Best, C.J., "on a fashionable

milliner that she is precluded from supplying a lady without previous enquiry into her authority. The court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife."

JOLLY v. REES.

[34.]

[15 C. B., N. S.]

Mr. Rees was a country gentleman living near Llanelly, and a man resolved to be master in his own house. Considering ladies when unadorned adorned the most, he told Mrs. Rees that he was not going to pay for any drapery or millinery goods she or her daughters might choose to buy on tick. They could do well enough, he said, on the allowance they already had. In spite of this distinct prohibition, Mrs. Rees favoured Messrs. Jolly, hosiers and linendrapers at Bath, with substantial orders, and they by and by favoured Mr. Rees with a substantial Christmas bill. This Mr. Rees absolutely declined to have anything to do with, and litigation ensued. The tradesmen had not known that Mr. Rees had expressly forbidden his wife to incur surreptitious debts, and the goods they had supplied were what the law calls "necessaries," so they felt confident of success. The judges, however, decided against them, and thus "carried to its logical results the principle that the wife's authority to bind her husband is a mere question of agency."

SMOUT v. ILBERRY.

[35.]

[10 M. & W.]

Why Mr. Ilberry deserted the bosom of his family and sailed for China, whether it was for the benefit of his health

or merely with a view to seeing the world, we do not know, and, as it does not in the least matter, we can be content to remain in ignorance. Smout was the family butcher; and he continued to supply the goodwife and the little Ilberrys with beef and mutton after the goodman of the house had gone away, in the hope that he would one day return and pay the bill. *Dis aliter visum est*. Mr. Ilberry's eyes never beheld again the white cliffs of Dover.

It was not till months afterwards that the news of Ilberry's death reached Smout, and by that time pounds upon pounds of unpaid-for butcher's meat had gone down the Ilberry throats. Mr. Smout thought, not unreasonably, that he ought to be paid by somebody for the meat supplied between the time of Mr. Ilberry's death and of the news of that event reaching England, he did not much care by whom. But to his consternation—and it certainly was rather hard lines on him—he was told that *nobody* was liable; not the *executors*, because Ilberry's death revoked the authority of agents to bind his estate; and not the *wife*, because she acted with perfect innocence and in ignorance that her authority to pledge her husband's credit had come to an end.

The law of husband and wife in respect of the wife's power to bind her husband to a contract she has entered into is best considered under two heads :—

- (1). When husband and wife are living together.
- (2). When they are not.

(1). When husband and wife are living together there is a presumption that the wife has her husband's authority to enter into a contract so as to bind him for "necessaries." But there are several ways in which a husband may rebut the presumption. He may show that at the time when his wife incurred the debt she was already properly supplied with necessaries, or, which is the same thing, with money to purchase them; he may show (while *Jolly v. Rees* remains law) that he expressly forbade his wife to pledge his credit; he may show that he expressly forbade the plaintiff to trust his wife; or, lastly, he may show that the credit was given to the woman herself.

(2). When husband and wife are living apart, the presumption is that the wife has no authority to pledge her husband's credit. And

when the separation is the wife's fault, when she has left her home without just cause,—for example, to live with an adulterer,—this presumption cannot be rebutted. But if it is by mutual consent that husband and wife are living separate, or, if the wife has been driven out of doors by her husband, or if his conduct at home is so abominable that no decent woman could live under the same roof with him, she goes forth with implied authority to pledge his credit for necessaries. If, however, the husband makes his wife a sufficient allowance, or what she accepts as a sufficient allowance, when thus living separate, and actually pays it, the tradesman cannot recover against the husband; and it is not material that the tradesman had no notice of this allowance. Probably, too, if the woman has money of her own, or if she can earn it, she has no implied authority to pledge her husband's credit.

"Necessaries" are considered to be such things as may fairly be presumed necessary for a wife's decent maintenance and general comfort, having regard to her husband's station. The cases on the subject are numerous. It has been held that a wife may make her husband liable for the cost of exhibiting articles of the peace against him, but not of prosecuting him for an assault. So he may have to pay the cost of legal advice to the wife respecting an ante-nuptial settlement, and of successful divorce proceedings instituted against him.

The case of *Smout v. Ilberry* is a well-known and sometimes criticised authority. It is to be observed that it was in *Blades v. Free* that it was decided that the executors are not liable in such a case, *Smout v. Ilberry* only deciding the non-liability of the wife.

It may be remarked that, to make the man liable on the woman's contracts, it is not necessary that the strict relationship of husband and wife should exist between them. The presumption of authority arises whenever a man and woman are cohabiting, whether married or not; and it is no answer to show that the plaintiff knew perfectly well that the church had not blessed their union.

Eastland v. Burchell,
3 Q. B. D.
Mizen v. Pick,
3 M. & W.
Johnston v. Sumner,
3 H. & N.
Turner v. Rooke,
10 Ad. & E.
Grindell v. Godmond,
5 Ad. & E.
Wilson v. Ford, L. R.
3 Ex.
Ottaway v. Hamilton,
3 C. P. D.
9 B. & C.
Watson v. Threlkeld,
2 Esp.

Extent of Agent's Authority.

COX v. MIDLAND COUNTIES RAILWAY CO.

[36.]

[3 EXCH.]

A labourer, answering to the euphonious cognomen of Higgins, took a ticket for the parliamentary train from

Whittington, near Birmingham, to somewhere else. As he was getting in, the guard (with a creditable desire to get along) signalled the train to start, the consequence of which was that Mr. Higgins fell, and two or three wheels went over him. They took him to a neighbouring pub., and sent for Mr. Davis, the local surgeon to the company. Mr. Davis came, pronounced it a bad case, and sent word to the station-master at Birmingham that he should like to have the assistance of Mr. Cox, the eminent hospital surgeon at Birmingham. The station-master, on receiving this message, sent for Mr. Cox, who, to the neglect of his extensive and lucrative practice, went immediately to Whittington, and amputated—successfully, the humane reader will be pleased to hear—the labourer's leg.

This action was on “assumpsit for work and labour as a surgeon,” and the question was whether the station-master had power to bind the company to such a contract. It was held that he had no such power.

In some cases the law implies an authority to contract for another so as to bind him from the *necessity* of the occasion. The master of a ship, for instance, may pledge the credit of his owners for most purposes incidental to the due prosecution of the voyage. And in the pre-railway days the driver of a stage-coach would have had implied authority to repair the breaking of a wheel or any other disaster which threatened to delay the coach. So, too, in a case in which a man had sent a horse down from King's Cross to Sandy, but had not given any address, or told anyone to meet it, it was held that the railway company, rather than the wretched horse should starve, must be taken to have authority from the owner to incur livery stable expenses on his behalf. Such cases, however, stand on a different footing from Cox's case, which had no reference to the main purpose of the station-master's existence. In an important case, in which it was held that the general manager of a mine had no implied authority to borrow money in an emergency, Parke, B., said, “No such power exists except in the cases of the master of a ship, and of the acceptor of a bill for the honour of the drawer. The latter derives its existence from the law of merchants, and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents

*G. N. Ry.
Co. v.
Swaffield,
L. R. 9 Ex.*

at sea, when it may be necessary in order to have the vessel repaired or to raise the means of continuing the voyage, to pledge the property of her owners; and therefore it is that the law invests the vessel with power to raise money, and by an instrument of hypothecation to pledge the ship itself if necessary."

The student must notice a distinction,—more valuable, perhaps, on paper than in practice,—between *general* agents and *particular* agents. A general agent is one whom his principal has placed in a certain position, and who must therefore be taken, no matter what his private instructions may be, to have authority to do all acts which are usually done by persons filling that position. A particular agent is one who is entrusted with a particular job, and must strictly pursue his instructions. A *general* agent may deviate from his instructions, and yet bind his principal: not so a *particular* agent; persons dealing with him are bound at their peril to ascertain the extent of his authority. Thus, a horse-dealer's servant must be assumed to have authority to warrant, and the master will be bound, altho' he expressly told the servant not to warrant; but if an ordinary person tells his servant to sell a horse and not to give a warranty with it, and the servant then in defiance of his orders does give a warranty, it will not bind the master.

Tho' (as we see in the leading case) a *station-master* may not, it has been held in a later case that the *general manager* of a railway company *may* pledge his master's credit for medical expenses.

A somewhat similar point has lately come up before the Exchequer Division, the question (decided in the negative) being whether a ship's husband can bind his owners by an agreement to cancel the charter-party.

Tho' an agent may have exceeded his authority in such a way that his principal is not bound, still the principal may, if he pleases, ratify the unauthorised contract. *Omnis ratihabitio*, &c., as the proverb says. Very slight evidence of ratification is sufficient, but the principal cannot ratify part and repudiate the rest. He must take all or none. It is necessary that the agent should have professed to act as agent merely. There can be no ratification if he assumed to act on his own account. For this reason (amongst others) it was held that a person whose name had been forged on a promissory note could not ratify the act of the forger and accept the paternity of the document.

Hawtayne
v. *Bourne*,
7 M. & W

Fenn v.
Harrison,
3 T. R.

Brady v.
Todd,
9 C.B., N.S.

Walker v.
G. W. Ry.
Co., L. R.
2 Ex.

Thomas v.
Lewis,
4 Ex. Div.

Horil v.
Pack,
7 East.

Brook v.
Hook,
L. R. 6 Ex.

Responsibility of Principal for Fraud of Agent.

[37.]

CORNFOOT v. FOWKE.

[6 M. & W.]

The defendant was a Leicestershire baronet, who wanted a town-house for the purpose of educating his children. On making inquiries he heard of a house in York Place, Baker Street, which seemed likely to suit, and he went with the owner's agent to have a look at it. It seemed just the thing he wanted. Everything was satisfactory. It was quiet, respectable, comfortable; and the most critical eye could have detected nothing wrong. "Pray, sir," asked the baronet, innocently, "is there anything objectionable about the house?" "Nothing whatever," was the agent's pat reply; and, indeed, the man quite believed what he said. On the strength of this assertion Fowke took the house, and congratulated himself on his luck. But the day after signing the agreement he discovered, to his consternation, that he had pitched his tent next door to "a brothel of the worst description"—a den so foul that the neighbours not only could not let their lodgings, but were obliged themselves to leave their houses. The plaintiff, the owner of the house Fowke had taken, was perfectly aware of the existence of this filthy place, and had tried ineffectually to get it suppressed. Still, he had not authorised his agent to say there was nothing objectionable about the house, and so, with a virtuous air, he brought this action on the agreement to take the house. The defendant pleaded that he had been induced to make the agreement by the plaintiff's fraud, contending that Cornfoot's knowledge should be coupled with his agent's

assertion. This view, however, did not commend itself to the minds of the judges, who considered that there had been no fraud, and consequently that the baronet was liable.

It is not impossible that the case of *Cornfoot v. Fowke* may some day be overruled in favour of the view there unsuccessfully contended for, and of the principle that, if a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril.

In *Udell v. Atherton* the question arose as to the liability of an innocent principal for a fraudulent representation made by his agent as to the quality of some timber. The sale was effected, of course, for the benefit of the principal, who adopted the contract and received part of the price; and on this ground two of the judges thought the defendant was liable. The question, however, was left undecided, as there was an equal division. But this conflict of opinion would seem to be now at an end, and the law to be clear that in such a case the fraud of an agent is the fraud of his principal. But to make a principal liable for the agent's fraud the latter must have committed the fraud for the principal's benefit and distinctly as representing him. A Sheffield manufacturer not long ago was asked to supply 500 tons of iron rails to a gentleman named Russell, who banked with the Gloucestershire Banking Company at the Cheltenham branch. Accordingly he got his bankers to write and ask the manager of the Gloucestershire Banking Company at Cheltenham whether he considered Russell good for £50,000. The manager replied that he was, tho' he well knew that he was not. In fact, soon afterwards Russell became insolvent, and the Sheffielder, who had let him have the rails, brought an action against the Gloucestershire Banking Company, alleging that they were responsible for their manager's fraudulent representation. It was held, however, that they were not responsible for it, chiefly on the ground that the enquiry must be taken to have been made *not of the bank but of the individual*, notwithstanding that it was within the scope of the manager's authority to give the information, and he would have been doing a wrong to the bank which employed him in refusing it. In another and very recent case it was held that a director could not be made liable for a fraudulent prospectus issued by brokers employed to place debentures, the director not having in any way authorised the fraud, and deriving no personal benefit from it.

Fuller v. Wilson,
3 Q. B.

7 H. & N.

Barwick v. Eng. Joint Stock Bank, L.
R. 2 Ex.;
and see
Blake v. Albion Life Assurance Society,
4 C. P. D.

Swift v. Jewsbury,
L.R. 9 Q. B.

Weir v. Bell, 3 Ex. Div.

Undisclosed Principals, &c.

[38.]

PATERSON v. GANDASEQUI.

[15 EAST & S. L. C.]

Gandasequi, a respectable and enterprising Spanish merchant, made up his mind that the foreign market could do with some silks and satins. He accordingly set sail for England, and, on reaching London, went to Larrazabal and Co., certain agents in the City, and commissioned them to buy a quantity of goods for him. Larr. and Co. (life is too short to repeat the whole name) proceeded to execute the commission, and asked Paterson and Co., a great hosiery firm, to send certain specified articles with terms and prices. Now, Paterson and Co. knew Larr. and Co., and had perfect confidence in them, but Gandasequi they did not know, and had no confidence in. Therefore, tho' they sent the goods and tho' they knew perfectly well that they were really for Gandasequi, and that Larr. and Co. were merely his agents in the matter, yet for all that they booked the goods as sold to Larr. and Co. This was unfortunate, because it happened that Gandasequi was really a more substantial person than his agents, who shortly afterwards went to financial smash. Paterson was not disposed to be content with the fraction of his debt, which, as a creditor in bankruptcy, he might have got from Larr. and Co., and, with the laudable object of getting the whole of his money, sued Gandasequi.

But it was held that, if the seller of goods knows that the person he deals with is only an agent *and knows also who his principal is*, and in spite of that knowledge chooses to give the credit to the agent, he must stand by his choice, and cannot sue the principal.

DAVENPORT *v.* THOMSON.

[39.]

[9 B. & C. & S. L. C.]

A person named McKune carried on at Liverpool the business—whatever it may be—of a “general Scotch agent.” This gentleman one day received a letter from some clients of his in the land of Burns to the following purport:—

“Dumfries, 29th March, 1823.

“Dear Sir,—Annexed is a list of goods which you will please procure and ship per *Nancy*. Memorandum of goods to be shipped:—twelve crates of Staffordshire ware, crown window glass, ten square boxes, &c., &c.

“Yours for ever,

“THOMSON AND CO.”

On receiving this letter, McKune went straight to the shop of Davenport and Co., who were glass and earthenware dealers, and had an interview with their head partner. He did not pretend to be buying for himself. He said he had received an order to purchase some goods for some clients in Scotland, *but he did not mention their name*, and the Davenports did not ask for it. They sold about £200 worth of goods and debited McKune, tho’ they knew perfectly well he was only an agent. Then McKune failed without having paid Davenport and Co.

This was an action by Davenport and Co. against McKune’s principals, Thomson and Co., who denied their liability on the ground that Davenport and Co. had debited McKune, and could, therefore, look only to him for payment. This view, however, was not adopted by the court, and Thomson and Co. were made to pay, the principle being that, as the name of the real buyer had not been disclosed to them by the agent, the sellers had had no opportunity of writing him down as their debtor.

The chief rules on this subject are,—

1. Where you contract with a man whom you know to be an agent, and you know also who his principal is, but, in spite of such knowledge, you give credit to the agent, and to him alone, you are bound by such election, and cannot afterwards sue the principal.

2. Where you deal with a man who appears to be a principal, you may, on discovering that he is only an agent, sue him or his principal at your pleasure. It is necessary, however, that you should make your election between them within a reasonable time.

Smethurst
v. Mitchell,
1 E. & E.

3. Where you deal with a man who is known to be an agent, but whose principal is undisclosed, you may, on giving evidence that he is himself principal, sue him ; otherwise, you must sue his principal.

Carr v.
Jackson,
7 Ex. and
Hutchinson
v. Tatham,
1 L. R. 8 C.
P.

If a person signs a contract in his own name without disclosing the fact that he is only an agent, he is *primâ facie* to be deemed the person responsible ; and, on an action being brought against him on the contract, he cannot turn round and shuffle off his liability by saying that he was only somebody else's agent. Parol evidence to prove such a thing would not be admitted, and, if he gets out of the scrape at all, it will be because it is quite clear from the rest of the document that he did not mean to bind himself personally. And, indeed, the person who has signed a contract in his own name may still be liable, altho' in the body of the contract he has expressly declared himself to be an agent. Very recently a charter-party was entered into between some shipowners, the plaintiffs, and the defendants "as agents for charterers." But the defendants signed it in their own name without qualification, and were accordingly held liable. "The defendants," said Pollock, B., "have signed the charter-party without any reservation, and the rule of law which has been quoted from Smith's Leading Cases applies. That rule is, that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal. Now the words 'as agents for charterers' do not in themselves, as the cases on the

Hough v.
Manzanos,
4 Ex. Div.

E. B. & E.

subject show, make that intention apparent. Thus, from *Oglesby v. Yglesias*, it appears that the words 'as agent for the freighters' in the body of the charter-party would not relieve the party signing from liability. In *Paice v. Walker* the words 'as agents for' a named foreign principal were held to be a mere description of the defendants, and not to free them from liability. In *Gadd v. Houghton*, which was tried before me at Liverpool, the words were 'on account of' a foreign principal. In that case I held that the defendants were not liable, and this judgment, tho' overruled by the Exchequer Division, was upheld in the Court of Appeal. James, L.J., based

1 Ex. Div.;
and see
Ogden v.
Hall, 40
L.T., N.S.

his decision on the difference between the expressions 'as agents for' and 'on account of'—a distinction I confess I cannot appreciate, but which leaves *Paice v. Walker* an authority binding on me here." Suppose, however, that the person has signed "as agent," this is very strong evidence to show that he is not personally liable. But still it is not conclusive. A custom, for example, may be proved to show that an agent is personally liable in spite of his purporting to be only an agent. And when there is no responsible person to be the principal, the agent is personally liable, however pathetically he may insist that he is only agent. A contractor agreed with some persons to pave the streets of Putney, and they "on behalf of the parish" agreed to pay for it. In spite of their having thus contracted as agents, it was held that they were personally liable. At one time it was considered to be the law that whenever an agent in England contracted on behalf of a foreign principal he was himself responsible, because he could be got hold of more easily. The question, however, in such a case is really one of fact, viz., to whom was credit given?

Parol evidence is always admissible to charge an undisclosed principal, while, on the other hand, the undisclosed principal may give parol evidence to show that he is not really liable, because, for instance, he furnished the agent with sufficient funds to pay. Sometimes, too, the undisclosed principal wishes to come forward and take advantage of the contract made for him by his agent. This he can generally do, but not if the agent has contracted in such terms as to lead anyone to suppose that he is himself the principal. A widow once brought an action on a charter-party for freight, demurrage, &c. She was the owner of a ship called the *Ann*. But when the charter-party was produced it appeared that her hopeful son, who was really only her agent in the matter, had had the temerity to write that it was "that day mutually agreed between C. J. Humble, Esq., owner of the good ship the *Ann*." It was held that parol evidence could not be given to show that the young man was only acting as the old lady's agent

Deslandes v. Gregory,
2 E. & E.

Humfrey v. Dale,
7 E. & B.;
but see

Southwell v. Bowditch,
1 C. P. D.

Myriel v. Hymen-sold,

Hardw.,
and

Lennard v. Robinson,
5 E. & B.

Mahony v. Kekulé,
14 C. B.

Trueman v. Loder,
11 A. & E.

Humble v. Hunter,
12 Q. B.

Set-Off against Factor's Principal.

GEORGE v. CLAGETT.

[40.]

[7 T. R. & S. L. C.]

Messrs. Rich and Heapy carried on business in woollen cloths. For the purposes of their riches heaping they were

not content with carrying on business on their own account, but acted also as factors for other people. As they carried on all their business at the same warehouse, it would not be obvious when they were acting as principals and when as agents. At the time of our story Messrs. Rich and Heapy happened to have in their possession as factors a large quantity of goods belonging to Mr. George, a clothier of Frome, which goods were in their warehouse along with goods belonging to themselves. It happened just then that Messrs. Clagett were in want of such goods. They held a bill of exchange for £1200, accepted by Rich and Heapy, and as they saw no particular likelihood of getting paid, they thought it would not be a bad plan to buy goods from them on credit, and deduct the amount of the bill from the purchase-money. In pursuance of this plan, Messrs. Rich and Heapy sold them a quantity of goods, making out a bill of parcels for the whole in their own names, and Messrs. Clagett fully believed that they were dealing with principals. Messrs. Rich and Heapy took the goods out of one general mass in their warehouse, so that a large portion of them really belonged to the clothier of Frome, the unfortunate Mr. George.

This was an action by that gentleman against Messrs. Clagett for the price of the portion of the goods which belonged to him, and which he said Messrs. Rich and Heapy had sold as his agents. Messrs. Clagett said they did not know that Rich and Heapy were his agents or anybody else's agents, and claimed to have the same right of set-off (that is to say, of deducting the above-mentioned debt) which they would have had against Messrs. Rich and Heapy. In this contention they were successful.

"In all these cases of set-off," says Lord Truro in a later case, "the law endeavours to meet the real honesty and justice of the case. Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own

goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller."

These words put the rule and its reason very clearly. And Lord Truro goes on,—

Fisk v. Kempton,
7 C. B.

"But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case there would be no honesty in allowing the purchaser to set off a bad debt at the expense of the principal."

As to this last point, the effect of the decisions seems to be that, altho' the defendant had the *means of knowing* that he was dealing with an agent, and did not make use of them, he is still entitled to his right of set off. But, of course, the fact that a man has ready to hand the means of knowing a thing is evidence, to some extent, that he actually does know it.

Borries v. Imp. Ott. Bank, L.R.
9 C. P.

It is to be observed that the principle of *George v. Clagett* does not extend to brokers, a broker differing from a factor in not having the possession of the goods, so that a purchaser could not well be deceived; nor to cases where the claim is for unliquidated damages.

Bell v. Gardiner,
4 M. & G.

The principle, however, has been extended to cases where the purchaser knew that he was dealing with a factor, but believed that the factor had a right to sell, and was selling, to repay himself advances, and to the case of a partner allowed by the firm to appear as the sole owner of partnership property.

Baring v. Corrie,
2 B. & Ald.
Turner v. Thomas,
L.R. 6 C.P.

This may be a convenient place to mention the existence of certain Acts called the Factors' Acts, which enable a factor to give a title by way of pledge, and in various other ways protect an innocent person from being taken in by appearances. The effect of these Acts are thus shortly given in Chitty's Statutes :—

Warner v. McKay,
1 M. & W.
Gordon v. Ellis,
2 C. B.

"First, where goods, or documents for the delivery of goods, are pledged as a security for present or future advances, with the knowledge that they are not the property of the factor, but without notice that he is acting without authority, in such case the pledgee acquires an absolute lien.

6 & 7 Geo.
IV., c. 94;
5 & 6 Vict.
c. 39; and
40 & 41
Vict. c. 39.

"Secondly, where goods are pledged by the factor, without notice to the pledgee that they are the property of another, as a security for a pre-existing debt, in that case the pledgee acquires the same right as the factor had.

"Thirdly, where a contract to pledge is made in consideration of the delivery of other goods or documents of title upon which the person delivering them up had a lien for a previous advance (which is deemed to be a contract for a present advance), in that case the pledgee acquires an absolute lien to the extent of the value of the goods given up."

These Acts, it has been held, do not operate to enable persons merely entrusted with the possession of goods for custody (such as warehousemen) to give titles binding their employers. A recent case of some importance on this subject is *Johnson v. Credit Lyonnais Co.* A person, named Hoffman, a tobacco merchant and broker, had a quantity of tobacco lying in bond in his name in the warehouses of the St. Katharine's Dock Company. This tobacco he sold to a Bolton tobaccoist named Johnson. It was not convenient to Mr. Johnson to take it out of bond just then; so, altho' he had paid for it, he allowed the dock warrants and other indicia of property to remain in Hoffman's hands. Hoffman then took a mean advantage of his being the ostensible owner of the tobacco, and fraudulently obtained advances on the pledge of a portion of it from the Credit Lyonnais Company. It was held in an action that the company were not protected by the Factors' Acts, or anything else, against being obliged to pay Johnson the value of the tobacco pledged.

3 C. P. D.,
and see
Fuentes v.
Montis,
L. R. 4 C.
P.; and
Cole v.
North
Western
Bank, L.R.
10 C. P.

Agent Exceeding Authority Liable in Contract.

[41.]

COLLEN v. WRIGHT.

[8 E. & B.]

Mr. Wright was the land agent of a gentleman named Dunn Gardner, and as such made an agreement with a Mr. Collen for the lease to him for twelve and a-half years of a farm of Dunn Gardner's. On the strength of this agreement Collen entered on the enjoyment of the farm; but he soon found that there was a serious difficulty in the way. Mr. Dunn Gardner refused to execute any such lease, saying that he had never authorised Mr. Wright to agree for a lease for so long a term; and this proved to be the fact.

This was an action by the disappointed farmer against the executors of the agent who had led him wrong, and the main question was whether Wright's assuming to act as Dunn Gardner's agent to grant the lease amounted

to a contract on his part that he had such authority. This was the view ultimately adopted, so that Wright's executors became liable to Collen.

A person who contracts as agent for another, when he really has no authority from him, cannot be sued as a principal on the contract. If he has professed to be agent, when he knew perfectly well he was nothing of the kind, he can be sued in tort on his false representation. The case of *Randell v. Trimen* may be consulted on this point. It was the case of an architect falsely representing that he had authority to order stone from the plaintiffs for a church in course of erection. But as we have seen in *Collen v. Wright*, even when the professed agent has acted perfectly in good faith, he is liable for any damages that may be sustained by reason of the assertion of authority being untrue, not indeed in tort, but on an implied warranty that he had the authority he professed to have. It is very much the same doctrine which takes a person who promises marriage to warrant that he is legally competent to marry.

Dickson v. Reuter's Telegram Co., 3 C. P. D.

A couple of years ago an attempt was made to extend the principle of *Collen v. Wright* to the case of a blunder in a telegram, the contention being that the defendant telegram company must be taken to have warranted that the message was correct. This view, however, did not prevail. "The general rule of law," said Bramwell, L.J., 'is clear, that no action is maintainable for a mere statement, altho' untrue, and altho' acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. . . . But then it is urged that the decision in *Collen v. Wright* has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen v. Wright*, properly understood, shows that there is an exception to that general rule. *Collen v. Wright* establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: If a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself, and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen v. Wright*. If so, it appears to me that it does not apply to the facts before us, because, in the present case, I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists:

no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and *Collen v. Wright*, and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred."

Goods privileged from Distress.

[42]

SIMPSON v. HARTOPP.

[WILLES & S. L. C.]

John Armstrong was a stocking-weaver of Leicester, and rented a small cottage of the defendant Hartopp. Early in 1741 he hired a stocking-frame from the plaintiff Simpson at so much a week for the purposes of his trade. About the end of the year, as tenants will do, he got behindhand with his rent, and Hartopp, as landlord will do, distrained on him. There was not much for the bailiffs when they came; indeed, so little that there was not enough to satisfy the rent in arrear without carrying off Simpson's stocking-frame. This was done, altho' "the said John Armstrong's apprentice was then weaving a stocking on the said frame."

When he heard of this, the anger of Simpson was kindled, and he brought an action of trover for the stocking-frame, and succeeded in getting it restored to him; for a landlord has no business to distrain on what is *actually in use* at the time.

The general rule is, that all personal chattels can be distrained for rent. *Simpson v. Hartopp* introduces us to the exceptions—

1. Some things are *absolutely* privileged from distress; under no circumstances can they be taken. Such things are—

(1). Things in the personal use of a man; because the law does not wish to encourage breaches of the peace.

(2). Fixtures ;

because damage would be done to the freehold in tearing them away.

A landlord is empowered by statute to distrain growing corn, &c.

(3). Things sent to the tenant to be wrought on in the way of his calling ;

11 Geo. II.
c. 19, s. 8.

this exemption is for the sake of trade ; no one would like his boots to be at the mercy of his cobbler's landlord whenever they required mending. But the goods must be *on the premises* of the person exercising the trade, or they will not be privileged.

Lyons v.
Elliott,
1 Q. B. D.

(4). Perishable articles (*e.g.*, fruit, fish, cocks of corn, &c.) ;

because such articles cannot be restored *in statu quo ante* distraint ;

they soon become corrupt and uneatable.

Morley v.
Pincombe,
2 Exch.

(5). Wild animals (*feræ naturæ*, as the law-books call them) ;

because no one has any valuable property in them. Dogs were once considered *feræ naturæ*—one judge went so far as to call them vermin—but they are not now, nor are deer in a park ; and when an animal, naturally wild, has discarded its rough manners and settled down as to play the humbler rôle of domestic pet—a tame fox or a dancing bear, for instance—it may be distrained as much as a horse or a donkey.

Davies v.
Powell,
Willes.

(6). Goods in the custody of the law ;

because already taken in execution, for instance.

(7). Money lying about.

(8). Lodgers' goods ;

by virtue of an Act passed in 1871. But the lodger must take certain steps pointed out by the Act. It has been held that an under tenant is a lodger for the purposes of the Act.

Wilson v.
Ducket,
2 Mod.

34 & 35
Vict. c. 79.

Philips v.
Henson,
3 C. P. D.

2. Certain other things are privileged *conditionally*. They can be taken, but only when there are not sufficient other goods on the premises to satisfy the landlord's claim. Such things are—

(1). The instruments of a man's trade ;

e.g., a navy's pickaxe, a doctor's stethoscope, a lawyer's "Leading Cases," or a stocking-weaver's frame. It would be contrary to public policy to take the means whereby a man lives. Of course, if the lawyer were actually reading his law-book, or the doctor using his surgical instrument, such things would be *absolutely* privileged, as being in their personal use ; so that there would be no necessity to make them out to be conditionally privileged.

(2). Beasts of the plough ;

but not colts, steers, or heifers. Beasts of the plough, however, can be distrained for poor-rates, whether there are other things on the premises or not.

(3). Beasts which, tho' not beasts of the plough, yet improve the land ;

e.g., sheep.

Hutchins
v. Chambers,
1 Burr.

The effect of taking privileged goods is to make the distraining landlord a trespasser *ab initio*. But where part only of the goods distrained are privileged, he is trespasser *ab initio* only in respect of

Harvey v. that part.

Pocock,

11 M. & W.

Agricultural Fixtures, &c.

[43.]

— **ELWES v. MAW.**

[3 EAST & S. L. C.]

Towards the close of the last century, Elwes let a farm at Bigby, in Lincolnshire, to Maw for twenty-one years, and during his tenancy Maw conceived and carried out various improvements for the more profitable occupation of the land. He built a beast-house, a carpenter's house, and a pigeon-house, amongst other things. By and by the twenty-one years came to an end, and the time came for Maw to go. A few days before leaving, he set his labourers to work to pull down the beast-house, and the carpenter's house, and the pigeon-house, and whatever else he had erected, and carted them all away, leaving the premises in just the same nude condition they were in when he entered. When Elwes heard of this, he was very angry. He said Maw had no right whatever to take away fixtures, it was flat burglary, and so on; and finally he brought an action for waste. There was no doubt that by the old Common Law whatever a lessee annexed to the freehold during his term, unless it was a trade fixture, became the landlord's when he left; but Maw's counsel argued that considering the capital farming required now-a-days, and the elaborate implements employed in the cultivation of the land, agriculture was every bit as much a trade as clock-making or ironmongering. Moreover,

they produced authorities which showed that hot-houses, posts, sheds, colliery engines, and the like, had in various cases been held to be removable by tenants as being trade erections; and they defied the plaintiff to show the difference between such things and the things the defendant had set up. All this was very plausible, but the judges came to the conclusion that Maw had no right to remove his erections. They said it would be a "dangerous innovation" to call agriculture trade, and that the hot-houses and the other erections the defendant made so much of, were all more or less connected with trade.

"Wherefore," as the poet says,

"Elwes the shrewd maintained his cause and his verdict,
Had great worship of all men there, and went homeward rejoicing,
Bearing the *postea*, goodly engrossed, the prize of the battle."

"Leading Cases done into English." 1876.

It may be questioned—with all respect, of course, be it said—whether the judges in this case made a right use of the authorities before them in coming to the conclusion they did. The matter, however, is of small moment now, as by the Agricultural Holdings Act, 1875, the tenant may always (unless he has prevented himself by contract from doing so) remove a fixture (barring a steam-engine) he has erected. The only conditions of his doing so are that he must have paid up all arrears of rent, must make good any damage done in removing the fixtures, and must give his landlord a month's notice in writing of his intention to remove them. On receiving such notice, the landlord, instead of allowing his tenant to take the fixtures away, may elect to purchase them at whatever sum a referee (supposing landlord and tenant to be unable to agree without such help) considers fair. This Act, however, does not apply to holdings of less than two acres, nor, of course, to those which are neither agricultural nor pastoral. An Act passed a quarter of a century previously had already relaxed to some extent the rigour of the old rule. But that Act applied only to fixtures erected with the consent in writing of the landlord, so that the later legislation is infinitely more important.

38 & 39
Vict. c. 92.

Sect. 58.
14 & 15
Vict. c. 25,
s. 3.

Fixtures erected for purposes of trade, ornament, or domestic use may, as a rule, be freely removed by the tenant.

On the whole, therefore, as between landlord and tenant, the maxim "*quicquid plantatur solo solo cedit*" has lost much of its pristine force and application. But the tenant must take care to re-

move the fixtures *during the tenancy*; otherwise the law will presume that he intended to make a present of them to his landlord. As between heir and executor, however, the law is more as it used to be, for the house or land cannot be ruthlessly denuded of fixtures which add materially to its enjoyment; the estate ought not to come to the heir maimed or disfigured. As between vendor and vendee, a sale of the freehold carries with it the fixtures, unless there is an express provision to the contrary.

Colegrave
v. *Dios*
Santos,
2 B. & C.

As to what constitutes a fixture, the following definition had the approval of the Queen's Bench in a case where the question was whether certain colliery railways were exempt from distress as being fixtures:—"It is necessary in order to constitute a fixture that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought into contact with it; the definition requires something more than mere juxtaposition, as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened to some fabric previously attached to the ground." It may be remarked, however, that there can be a "constructive annexation." Keys, heirlooms, charters, deer, fish, &c., are considered for most purposes to be annexed to the freehold.

Turner v.
Cameron,
39 L. J.
Q. B.

Leases for more than Three Years not in Writing.

[44.]

RIGGE v. BELL.

[5 T. R. & S. L. C.]

By parol merely, Rigge let Hague's Farm in Yorkshire to Bell for seven years, and Bell entered and paid rent. But the tenant did not give satisfaction, and Rigge determined to get rid of him. By the terms of the agreement Bell was to go out at Candlemas; but Rigge's view was, as the lease, being for more than three years, and yet not in writing, as the Statute of Frauds required, operated merely as a tenancy at will, he could make the man quit when he pleased, and was not bound by the terms they had agreed on. In this view he found himself mistaken,

for it was held that, "tho' the agreement be void by the Statute of Frauds as to the *duration* of the lease, it *must regulate the terms on which the tenancy subsists in other respects*, as to the rent, the time of the year when the tenant is to quit, &c."

CLAYTON *v.* BLAKEY.

[45.]

[8 T. R. & S. L. C.]

By parol merely, Mr. Clayton let Blakey some land for twenty-one years, and Blakey entered and paid rent. Two or three years afterwards, his landlord gave him notice to quit, and, as he treated such notice with supreme contempt, sued him for double rent for holding over. To this claim Blakey raised the somewhat cool defence that (by virtue of section 1 of the Statute of Frauds, which directs that any lease for more than three years not reduced into writing shall operate only as a tenancy at will) he was only a tenant at will, and ought to have been so described in the plaintiff's declaration. It was held, however, that Blakey was not a tenant at will, but a yearly tenant, and therefore the plaintiff's pleading was good enough to hit him.

The decision in *Clayton v. Blakey* seems at first sight rather extraordinary. The Statute of Frauds distinctly says that all leases by parol for more than three years shall be tenancies at will only. The decision intervenes and says—"No; they shall be yearly tenancies," thus putting the tenant in a better position than the statute left him in. The accepted explanation is that the statute's intention was that the estate should be an estate at will *to begin with*, but that, when once created, it should be liable, like any other estate at will, to be changed into a tenancy from year to year by payment of rent or anything showing an intention to create a yearly tenancy. But if there were no circumstances showing such intention, the estate would remain an estate at will.

These decisions are not affected by 8 & 9 Viet. c. 106, s. 3, which provides that a lease which is already required by law to be in writing must be also under seal, it having been held that the lease may be void as a lease because not under seal, and yet good as an agreement.

Waiver of Forfeiture, &c.

[46.]

DUMPOR v. SYMMS.*(Sometimes called Dumpor's Case.)*

[4 REP. & S. L. C.]

If the student chance to be dining with his grandfather, that esteemed but elderly relative (if in bygone days he has been connected with our noble profession) may expect him to know something about Dumpor's case; and, if he knows nothing about it, may think his descendant has made but slight progress in his legal studies. For this reason, but hardly for any other, it is desirable that the reader should make himself more or less acquainted with this truly wonderful case.

In the tenth year of Elizabeth's reign the excellent little College of Corpus, Oxford, made a lease for years of certain land to a Mr. Bolde, exacting from him a covenant that he would not alien the property to anybody else without the College's consent. Three years afterwards the College by deed gave him permission to alien to anybody he pleased, and soon afterwards Bolde availed himself of this permission and assigned the term to one Tubb. Tubb, after a brief enjoyment of this world's goods, made his will devising the lands to his son, and went over to the majority. The son entered, and also died, but intestate, and the ordinary granted administration to a person who assigned the term to the defendant Symms. Thereupon the wrath of the President and Scholars of the College of Corpus Christi, in the University of Oxford, was kindled. Bolde had covenanted with them not to assign without leave, and such a covenant, they said, should have been observed by whoever held the lands. Therefore they entered for

the broken condition, and leased to Dumpor for twenty-one years. Dumpor entered, but Symms re-entered, and for doing so Dumpor now brought this action of trespass against him, the College spectator of the tempest from the safe shore.

Dumpor did not succeed: the case was decided against him, on the ground that "if the lessors dispense with one alienation, they thereby dispense with all alienations after."

"Dumpor's case always struck me as extraordinary," said one judge in 1807. "The profession have always wondered at Dumpor's case," said another in 1812. And yet Dumpor's case remained the law of the land till 1860, when the legislature knocked it on the head by enacting that "every such licence should, unless otherwise expressed, extend only to the permission actually given." And the effect of the case was still further destroyed by an Act passed the next year, and prohibiting waivers in particular instances from being interpreted to mean general waivers. This was certainly the infusion of a little common sense into our common law.

22 & 23
Vict. c. 35.

23 & 24
Vict. c. 38.

Tho' Dumpor's case is therefore useless in itself, being of merely antiquarian interest, it is supposed to "lead" to the rather important subject of *waiver of forfeiture*. Tho' a lease is forfeited by the tenant's having broken some condition, the landlord, if he pleases—and that pleasure is inferred from certain acts—may elect to continue the man in his tenancy in spite of the broken condition. The most satisfactory of the acts which operate as a waiver of forfeiture is acceptance of rent; but there are others. The law leans against forfeitures, and any act on the part of the lessor showing an unequivocal intention to treat the lease as subsisting has the effect of putting an end to his right to take advantage of the forfeiture. "The cases are uniform in this," says Blackburn, J., in 1863, "that where a lease has been forfeited and there is an election to enter or not, if the landlord either by word or by act determines that the lease shall continue in existence, and communicates that determination to the other party, he has elected that the other shall go on as tenant, and that the tenancy shall continue, and having done so he cannot draw back."

Ward v.
Day,
4 B. & S.

Sometimes, however, the condition, instead of providing that "upon breach thereof the lessor may re-enter," provides that "upon breach thereof the lease shall become void," and it used to be said that in the latter case the lessor had no power to waive a forfeiture. It is probable, however, that this distinction, if it ever did, at all events does not now exist. As observed above, when the landlord has once

- made his election, he cannot go back from it. In the case of *Croft v. Lumley*, which was an action of ejectment to recover the Opera House in Pall Mall, a curious question arose as to the effect of a receipt of rent by a landlord which was accompanied by a statement on his part that he received the money *not as rent, but as compensation* for the use of the premises, and that he *did not intend to waive* a forfeiture which had, in his opinion, been incurred. Unfortunately the case went off on another point, so that the question was not decided. Probably, however, if it had been necessary to decide the question, it would have been held that there was no waiver of forfeiture here.
- See, however, *Davenport v. The Queen*, 3 App. Ca. It is a very common condition in a lease that the tenant shall not assign without his landlord's consent. It has been held that this condition is not broken by a compulsory assignment by law—under the bankruptcy laws, for instance; tho' it would be by a lessee's executing a deed and assigning all his property to trustees for the benefit of his creditors. Sometimes the covenant the tenant enters into is that he will not assign without his landlord's consent, "such consent not being arbitrarily withheld." These words, it has been held, do not amount to a covenant by the lessor that he will not refuse arbitrarily, but simply enable the lessee, if the lessor refuse his consent arbitrarily, to assign without any breach of covenant.
- Treloar v. Bigg*, L. R. 9 Ex.

Mortgagor's Tenants.

[47.]

KEECH v. HALL.

[1 Doug. & S. L. C.]

The owner of a warehouse in the city mortgaged it to Mr. Keech, but remained in possession. Soon afterwards, without saying a word to Keech on the subject, he leased it for seven years to Hall. Keech was very indignant at this. He said the mortgagor had exceeded his rights, having no business to do such a thing without consulting him, and that Hall was no better than a trespasser, and could be ejected without notice. And the judges coincided with his view of the matter. At first sight the tender-hearted student may think this a little rough on Hall;

but it is not really so; for if the man had taken the trouble to make proper enquiry he would soon have discovered that the person he was dealing with was only a mortgagor, and therefore that it would be a risky thing to take a lease from him.

MOSS v. GALLIMORE.

[48.]

[DOUGL. & S. L. C.]

Mr. Harrison began the year 1772 by letting a house to Moss for twenty years at the rent of £40 a year. Times were bad with Mr. Harrison, and in May of the same year he mortgaged the property to a Mrs. Gallimore, a nice old lady, who wanted eligible security for the nice little fortune which her late husband had left her. Moss was not in the least affected by this mortgage of the reversion. He went on quietly living in the house, and paid Harrison his rent pretty regularly up to November, 1778, when he was £28 behindhand. At that time Harrison, having sunk deeper and deeper into the mire, became bankrupt, being at the time indebted to Mrs. Gallimore for interest on the mortgage in a sum greater than £28. Mrs. Gallimore gave Moss notice of her being mortgagee, and told him to pay to her the £28 which he unquestionably owed to somebody. Moss showed no disposition to yield to this demand, and finally the old lady made a raid upon his chairs, tables, grandfather's clocks, &c. This distraint Moss considered a trespass, and brought this action accordingly. It was held, however, that the worthy Mrs. Gallimore was quite justified in distraining, for a mortgagee after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage is entitled to the rent in arrear at the time of the notice as well as to what accrues afterwards, and he may distrain for it after such notice.

The country squire, something of the sort says the immortal Williams in that famous volume of his, whose necessities have obliged him to mortgage his estate, is frequently under the impression that, in spite of the mortgage, he is as much monarch of all he surveys as he was before ; and is often disagreeably surprised to learn that he cannot so much as let a farm without the consent of the lawyer fellow to whom he has mortgaged. The legal position of the mortgagor varies according to circumstances. If he has expressly stipulated with the mortgagee for remaining in possession *for a time certain* (as distinguished from merely "until default") subject to the payment of interest, this has the effect of a redemise, and the mortgagor is then a termor. Sometimes he is made tenant to a person appointed jointly by himself and the mortgagee to receive the rents : or the agreement may take other forms. When no definite agreement has been made on the subject, the mortgagor is by way of being,—tho' he is not exactly,—tenant at sufferance, or tenant at will ; and if (like the owner of the warehouse we have just been reading about) he lets in any tenants, the mortgagee may treat them as trespassers. Supposing, however, the mortgagee in any way recognises their tenancy,—and whether he has done so or not is a question of fact for the jury,—they become his tenants at the rent they agreed with the mortgagor to pay. It was once thought that a mortgagee had only to give him notice to make one of these persons his own tenant. But it is now clear that there must be some evidence of the man's consent ; and that the tenancy which from the time of that consent begins is a *new tenancy* and not merely a continuation of the old one between himself and the mortgagor.

But see
Doe d.
Lyster v.
Goldwin,
2 Q. B.
Wilkinson
v. Hall,
3 Bing.
N. C.
Jolly v.
Arbutnot,
4 De G. &
J.

See *Doe v.*
Holes,
7 Bing.,
and *Doe v.*
Culwalla-
der, 2 B. &
Ad.
Evans v.
Elliott,
9 A. & E.,
and *Brown*
v. Storey,
1 M. & G.
Waddilove
v. Barnett,
2 Bing.
N. C.
S. 25,
sub-s. 5.

The mortgagor, tho' in some respects his position is cramped and undignified, may exercise acts of ownership which are not presumably a source of profit. For instance, he may hold his manorial court, vote for the Tory candidate, give his nephew a living, &c., &c., without drawing down on his head the wrath of the mortgagee.

The Judicature Act, 1873, gives power to a mortgagor in possession to sue for rent due to him, or to bring an action of trespass in most cases in his own name ; and it has been recently held that a mortgagor in receipt of rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee.

Faireclough
v. Mar-
shall,
4 Ex. Div.

The student will be able to distinguish *Moss v. Gallimore* from *Keech v. Hall* by recollecting clearly that the former case has to do with leases made by the mortgagor *before* the mortgage, and the latter with leases made by the mortgagor *after* the mortgage.

As to the former class of leases, it used to be necessary that the mortgagor's tenant should *attorn* to the mortgagee before the latter could claim rent from him. But it is now sufficient that the mortgagee should give the tenant *notice* to pay the rent to him.

*Covenants Running with the Land.***SPENCER v. CLARK.**

[49.]

(Sometimes called Spencer's Case.)

[5 REP. & S. L. C.]

In the days of good Queen Bess there lived a gentleman named Spencer who, wise in his generation, married a woman with money. Thus erected into a landed proprietor, he let a house and grounds to a member of the great family of Smith for a term of twenty-one years, and in the indenture Smith covenanted to build a brick wall on the lands let to him. Before very long Mr. Smith got tired of his residence, and assigned the demised premises to a Mr. Jones without having made the least attempt at building the brick wall. But Jones could not live there either, and he in his turn passed on the place to Clark. Meanwhile nobody had built the wall, and Spencer called on Clark to do it. "I'll see you —," replied Clark, in the most forcible Saxon of the period, "I've nothing to do with it; I never undertook to build any brick walls."

"Well but," said Spencer, "Smith did; and you stand in his shoes."

Argument, however, was useless, and Spencer went to law.

The judges had quite "a day" over this brick wall. "And, after many arguments at the bar, the case was excellently argued and debated by the justices at the bench . . . and many differences were taken and agreed concerning express covenants and covenants in law, and which of them would run with the land, and which of them are collateral and do not go with the land, and where the

assignee shall be bound without naming him, and where not ; and where he shall not be bound, altho' he be expressly named, and where not."

They decided in the end that Clark was *not* bound to build the wall, Smith not having covenanted for his assigns but *only for himself* as to a subject-matter *not in existence* at the time of the covenant.

A covenant "runs with the land" when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant "runs with the reversion" when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.

At common law covenants ran with the land, but not with the reversion. So that if a lessee covenanted to build a billiard-room on the demised premises, and his lessor becoming impecunious sold the estate to Brown, Brown could not sue for breach of the covenant in his own name ; he had to ask the lessor to please bring the action for him. The awkwardness of this state of things was not clearly perceived till the time of the Reformation ; when the lands of the suppressed monasteries were parcelled out among the Cavendishes and a few other destitute and deserving families. The grantees found that they could not reap the benefit of the conditions of re-entry which the fat monks had inserted in the leases of their tenants without the assistance of the monks themselves, which those worthies were of course too angry to render ; and so they applied for one of those beautiful bits of class legislation which we meet with so frequently up and down our history. The Act passed was 32 Hen. VIII. c. 34, which put the assignee of the reversion in the same position as the lessor himself stood, specially providing of course that grantees of monastic lands should be considered to be assignees of reversions. Both the benefit and the burden of covenants therefore now run with the reversion just in the same way that they always ran with the land. The assignees of the lessor and the assignees of the lessee stand on the same footing, so far as taking advantage of or being liable to perform covenants is concerned.

The law on the subject of covenants running with the land may be summarised as follows :—

1. Suppose the lessee who makes the covenant *omits all mention of his assigns* and thinks only of himself. In that case—

(a). If the covenant *has to do with something not in existence* at the time the lease is made, the assignee is not bound.

That is precisely the case of *Spencer v. Clark*. The brick wall was

See, however, *Mins-
hull v.
Oakes*,
2 H. & N.

“not in existence at the time the lease was made,” and I am not aware that it had any subsequent existence.

(b). But if the covenant has to do with something which *is in existence* at the time the lease is made, and *is part of the demised lands*, then the assignee is bound.

If, for example, Smith had covenanted to repair the house during the term, Clark would have been liable to perform that covenant. The house was in existence at the time the lease was made, and it was of course part of the demised lands.

2. Now suppose the lessee who makes the covenant *covenants for his assigns* as well as for himself.

(a). The assignee is of course liable in case (b) of 1.

A mild exercise of *à fortiori* reasoning will show that this is so. If an assignee is bound when he is *not* named, much more is he bound when he *is* named.

(b). But the assignee is also bound in case (a) of 1, provided that what is to be done is to be done on the demised premises.

Clark, for instance, would have had to build the wall if Smith had covenanted for his assigns.

(c). The assignee is not liable when the lessee's covenant is *collateral* to the lands demised.

If the lessee covenanted to build a dissenting chapel in the next parish, very well, let him go and do it; there is no great harm in a dissenting chapel. But such a covenant will not bind the lessee's assigns, for it has nothing to do with the demised lands.

Descending from the general to the particular, let us see what covenants sufficiently “touch and concern” the demised land so that their benefit or burden runs with it:—

1st. All implied covenants do. For example, the word “demise” implies a covenant for quiet enjoyment, so as to give the assignee of the lessee a right of action against the lessor if he is interrupted in the enjoyment of his lease.

2ndly. Whether any given express covenant runs with the land is of course a question for the court. Covenants to repair, to cultivate in a particular manner, to reside on the premises, to abstain from carrying on a particular trade, have all been held to run with the land, and the assignees to be responsible for their breach.

On the other hand, a covenant by the lessor of a beer-shop not to build or keep any house for the sale of beer within half a mile of the demised premises has been held not to run with the land.

It is to be observed that, even in a case where it is clear that a particular covenant does not run with the land, an assign may be bound by having notice of it.

There may of course be covenants respecting land between persons who do not stand to one another in the relation of landlord and

Thomas v.
Hayward,
L. R.
4 Exch.
Cooke v.
Chilcott,
3 Ch. Div.

tenant, and some of those covenants run with the land. Let us divide these covenants into two classes:—

1. Covenants made by a person *with* the owner of the land to do something in respect of that land.

The benefit of such a covenant runs with the land. If a prior were to covenant to sing psalms and spiritual songs, or to dance hornpipes on the lawn before the house on all the wet Fridays of the year, and the owner of the estate were to die, the prior would still be liable to catch an occasional cold, because the right to sue on such covenants runs with the land to each successive transferee of it, and the heir or devisee could insist on the prior continuing his performances. More usually, however, the covenantor is not a mere stranger like the prior, but the person who conveyed the land to the covenantee, and has covenanted for title.

2. Covenants made *by* the owner of land to do something in respect of that land.

Except, perhaps, in the case of rent-charges, such covenants do not run with the land. If they did, a purchaser might find himself saddled with obligations of which he knew nothing, and which would have deterred him from buying if he had known of them; and the law looks with disfavour on impediments to the free circulation of property. The owners of some iron-works covenanted for themselves and their assigns to get all the limestone wanted for the iron-works from a particular quarry, and to use a particular railroad for fetching it. By and by, the covenantors sold the iron-works to the defendants, who, to the disgust and impoverishment of the covenantees, began to lay down a new railroad to rival quarries. The covenantees, therefore, took legal proceedings, but unsuccessfully, because they were told that such a covenant, tho' perfectly binding on the covenantors themselves, did not bind their assignees.

It was at one time considered that covenants would not run with an estate to which the covenantee was entitled only by estoppel. It seems now clear, however, that they do where an estate by estoppel becomes an estate in interest, and in some other cases.

Keppel v. Bailey,
2 Milne
& K. See,
however,
on the
effect of
this case,
Luker v. Dennis,
7 Ch. Div.

Cuthbertson v. Irving,
4 H. & N.

Implied Warranty on Letting Furnished House.

[50.]

SMITH v. MARRABLE.

[11 M. & W.]

“5, Brunswick Place, Sept. 19, 1842.

“Lady Marrable informs Mrs. Smith that it is her

determination to leave the house in Brunswick Place as soon as she can take another, paying a week's rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain."

And in pursuance of this determination the Marrables moved out, and Smith went to law with them, alleging that as they had taken the house for five weeks they had no business to leave in this summary fashion, bugs or no bugs. The Marrables, on the other hand, successfully contended that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation, and that, if it is not fit, the tenant may quit without notice.

The famous bug case, after having been spoken disrespectfully of for many years, has in these latter days been expressly affirmed by the case of *Wilson v. Finch Hatton*, where its principle was applied ² Ex. Div. to stinks arising from defective drainage. It is to be observed that it is only in the case of *furnished* houses that reasonable fitness is an implied condition. In general, there is no such implied covenant by the lessor of land or houses, nor even that the house will endure during the term. Fraud and deceit, however, may make a difference.

Licences.

WOOD *v.* LEADBITTER.

[51.]

[13 M. & W.]

Mr. Wood always made a point of seeing the Leger. But, while he was in the Grand Stand enclosure at the Doncaster races in 1843, with a four days' ticket, for which he had paid a guinea, in his pocket, an official came up to him, and, "in consequence of some alleged malpractices of his on a former occasion connected with the turf," requested him to leave, adding that, if he did not,

it would be his painful duty to turn him out. Mr. Wood—bookmaker, welsher, or whatever he may have been—did not see it, and stoutly refused to budge an inch, whereupon Leadbitter, by order of Lord Eglintoun, the steward of the races, took him by the shoulders and dragged him out.

For this assault, as he called it, Mr. Wood now brought an action, maintaining that he was on the Grand Stand by the licence of Lord Eglintoun, inasmuch as that nobleman had sold him a ticket, and that such licence was irrevocable. It was held, however, that such a licence was *not* irrevocable, and that Lord Eglintoun had a perfect right, without returning the guinea, and without assigning any reason, to order the plaintiff to quit the enclosure, and, if necessary, to have him forcibly removed.

Wood v. Leadbitter goes no further than to establish that a *mere licence* is revocable, the reason being that such a licence confers no interest in land, but only renders lawful what would without it be a trespass. Such a licence may be revoked, not merely by express words, but by any act of the grantor which shows his unwillingness or inability to continue the licence. Locking a gate, for instance, would operate as a revocation of a licence to use a road, and so would the selling of a field to which the licence related. Of course, if the agreement was regular, an action for damages lies on the licence being revoked.

But if the licence is more than a mere licence, if it comprises or is connected with a grant, then the person who has given it cannot revoke it so as to derogate from his own grant. Thus, if a person sells goods on his own land, and gives the vendee a licence to come and take them, he cannot revoke the licence, and the vendee would be justified in breaking down the gates and entering to take the goods.

Tho' a licensee has no title as against his licensor, it is not so clear that he may not sue a third person who interrupts him in the enjoyment of his licence.

Nuttall v. Bracewell, L.R. 2 Ex., and *Corby v. Hill*, 4 C. B., N. S. 2 Q. B. D. The case of *Reg. v. St. Pancras Assessment Committee* may be referred to as to the difference between occupiers and licensees. It was a case in which they tried unsuccessfully to rate the ubiquitous Mr. Willing (he is welcome to this advertisement) in respect of some hoardings which somebody allowed him to set up on his land for advertising purposes.

2 Q. B. D. v. St. Pancras Assessment Committee 5 Q. B. D. 1891. 1891. 1891.

Contracts Contrary to Public Policy.

EGERTON v. BROWNLOW.

[52.]

[4 H. L. CAS.]

The seventh Earl of Bridgewater recognised the great truth that a duke is a bigger man than an earl. Tho' not fortunate enough to do so himself, he resolved that one of his clan should win and wear the strawberry leaves, and with that great object in view he sat down and made his will. He left immense estates to Lord Alford and his heirs, but expressly provided that, if Lord Alford died without being made a duke, they should go over. Lord Alford was *not* made a duke, but it was held nevertheless that the estates did *not* go over, as the condition subsequent which the earl had imposed was contrary to public policy and void.

"May I not do what I will with mine own?" Certainly; but you must observe one wholesome maxim, *sic utere tuo ut alienum non laedas*. "Every man," says Lord Truro, in *Egerton v. Brownlow*, "is restricted against using his property to the prejudice of others." And as a man is bound to use his own so as not to injure individuals, so he is under the same obligation towards the State, which is a collection of individuals. Public policy means "the public good recognised and protected by the most general maxims of the law and of the constitution," and on this "public policy" or "public good" *Egerton v. Brownlow* is an important case. It was considered that the condition violated that public policy because it would be "mischievous to the community at large that every branch of the public service should be besieged by persons who, at the peril of losing their estates, were making every effort to obtain offices for which they might be unfit, and to procure titles and distinctions of which they might be unworthy," and because the common law hates capricious conditions.

It is to be observed that in dealing with cases of this kind the courts are not distributing a kind of equity differing with the length of each judge's foot, but are acting on certain well-known principles

and maxims (e.g., *Salus populi suprema lex, Nihil quod est inconveniens est licitum*, &c.). If this were not so, the judge would be dangerously invading the province of the legislator, and *optimus est judex*, says the maxim, *qui minimum relinquit arbitrio suo; optimus judex qui minimum sibi*.

The student may with advantage refer to two recent cases on public policy. In one of them the plaintiff and defendant were both subscribers to a certain charity, the objects of which were elected by the subscribers with votes proportioned to the amount subscribed. The defendant was anxious on one occasion that a particular man should be elected, so, to compass his object, he agreed with the plaintiff that if the latter would give twenty-eight votes for the candidate at this election, he (the defendant) would at the next election give twenty-eight votes for anybody the plaintiff wished. It was urged that this agreement was void as against public policy, but the judges, while strongly disapproving of the transaction, held that it was not. In the other case the plaintiff had seduced a man's wife, and had then entered into an agreement with the husband that, if the latter would keep the affair secret, the former would not enforce payment of a certain bond. The husband died, and, perhaps, thinking the secret had died with him, the plaintiff sued on the bond. In answer to the claim, the executor pleaded the agreement; but the plea was held bad on the ground that there was no valid consideration for the plaintiff's promise.

*Bolton v.
Madden,*
L. R. 9
Q. B.

*Brown v.
Brine,*
1 Ex. Div.

Illegal Contracts.

[53.]

COLLINS v. BLANTERN.

[2 WILS. & S. L. C.]

Amongst other misdemeanants to be tried at the Stafford Summer Assizes, 1765, were five persons charged with perjury. It happened, however, that their prosecutor, a Mr. Rudge, was not of that lofty character which would prompt him scornfully to reject a bribe. The perjurers decided that he might be "got at," and they set to work accordingly. A friend of theirs, a disreputable surgeon named Collins, was persuaded to pay Rudge £350 to

“square” him; and, to indemnify Collins, the perjurers and another “pal,” named Blantern, executed a bond for the payment of £350. There would scarcely seem, however, to flourish among perjurers quite that chastity of honour which is ascribed by some people to thieves in their dealings with one another: for when Collins hinted at the repayment of the money he had advanced he was laughed at for his pains; and when at last he sued on the bond the perfidious crew successfully pleaded that the consideration for the bond was illegal and, altho’ it did not appear on the face of the deed, vitiated it.

Said Lord Chief Justice Wilmot, in memorable words, “You shall not stipulate for iniquity. All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul O! procul este profani!*”

A deed is of so solemn a nature that whatever a man therein asserts he is estopped from afterwards denying. On the other hand, “the pure fountains of justice” must not be polluted; and so we get engrafted on our rule the exception that illegality is fatal, not only to an ordinary agreement, but even to a deed.

It may happen, however, that the legal part of an agreement can be separated from the illegal. This can never be the case where one of several *considerations* is illegal, because it cannot be known which of the considerations induced the promise. But when the consideration is not illegal, and there are several promises, some of which are illegal and others are not, the agreement is void only if the illegal promises are incapable of being separated from the legal.

In the case of illegality of the kind which vitiated the deed in the leading case, a distinction is to be observed between criminal proceedings actually commenced, and criminal proceedings only impending or probable. Tho’ there may be a positive assertion to that effect, still, if there be no sound reason for believing a crime to have been

committed, a contract otherwise binding will not be affected by such assertion.

Rourke v. Mcaly,
41 L. T.,
N. S.

Illegal contracts are generally divided into two classes :—

1. Those illegal by common law.
2. Those illegal by statute law.

Under the former head come contracts in absolute restraint of trade, contracts in restraint of marriage, contracts impeding the administration of justice, immoral contracts, and the like. Under the latter head may be mentioned Sabbath-breaking contracts and gaming contracts. To make a contract void under this head the statute need not use express words of prohibition ; if it inflicts a penalty, it is sufficient. As to when a clause pointing out a particular way of doing a thing is *directory* and when *imperative*, the words of Taunton, J., may be remembered : “ A clause is directory where the provisions contain mere matter of direction, and no more ; but not so when they are followed by words of positive prohibition.”

Pearce v. Morrice,
2 A. & E.
See also
remarks of
Brett, L.J.,
in *Hunt v. Wimbledon*
Local Board,
p. 133.

A good idea of an illegal agreement may be derived from a bill for an account which is quoted in “ Lindley on Partnership ;” we have actually known the case of a law student reading it through without seeing the joke. The bill stated “ that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, &c. ; that the defendant applied to him to become a partner ; and that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads and at inns, taverns, alehouses, markets, and fairs ; that the plaintiff and the defendant proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch ; and afterwards the defendant told the plaintiff that Finchley in the county of Middlesex was a good and convenient place to deal in, and that commodities were very plentiful at Finchley, and it would be almost all clear gain to them : that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things ; that about a month afterwards the defendant informed the plaintiff that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money ; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, &c.” ; and so on. It is satisfactory to be able to add that not only was the bill dismissed with costs, and the solicitors and counsel fined, but that the plaintiff and the defendant both of them ended their careers at the public expense, and in the good old way.

It is to be observed that a contract perfectly good and legal in

itself may become void and illegal by being connected with a previous illegal contract ; which shows, of course, how important it is to keep out of bad company. A man once brought an action on a covenant for payment of money. But the defendant set up the defence that a contract had been formerly entered into between himself and the plaintiff, by the terms of which the plaintiff was to sell him some land for the illegal purpose of being sold by lottery ; and he said that the deed on which the plaintiff was now suing him was a security for the purchase-money of that land. The judges considered that this plea was an answer to the plaintiff's claim. "It is clear," they said, "that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement, and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which by the original bargain was tainted with illegality."

Money paid for an illegal purpose may be recovered back by the person who has paid it any time before the illegal purpose has been carried out ; but not afterwards. The reason why the money cannot be got back after the illegal purpose has been accomplished, is that the parties are then *in pari delicto*, and the maxim *melior est conditio possidentis* applies. "The true test," said the Queen's Bench, in a case in which a man tried unsuccessfully to get back a bank-note he had given a brothel-house keeper as a security for a debt for wines and suppers at the brothel, "for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party."

We should not recommend the student at present to dive deeply into the doctrine of *ultra vires*. But it may be well to inform him that that is the name given to those contracts which, being beyond the object of its existence, a corporation has no power to make, and which are therefore void. Thus, it has been held *ultra vires* for a railway company to work coal-mines, to trade with a line of steamers to a foreign port, and to take land merely for the purpose of selling it again at a profit.

Fisher v. Bridges,
3 E. & B.

Taylor v. Bowers,
1 Q. B. D.

Taylor v. Chester,
L. R. 4
Q. B. ; and
see *Simpson v. Bloss*,
7 Taunt.

Colman v. Eastern Counties Ry. Co.,
10 Beav.

Immorality.

[54.]

PEARCE v. BROOKS.

[L. R. 1 Ex.]

The plaintiff was a coach-builder, and tho' he knew the defendant to be a prostitute, and that she purposed to use it as part of her display to attract men, he let her have a miniature brougham on credit, and this was his action for the price. The friends of morality will be glad to hear that he did not get it.

3 B. & Ad. In deciding *Pearce v. Brooks* the court followed *Cannan v. Bryce*, where it was held that money lent and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, could not be recovered back by him.

1 B. & P. There is a case of *Lloyd v. Johnson* which may be thought to some extent to conflict with *Pearce v. Brooks*. The action was by a laundress against a prostitute for the washing of a variety of dresses and some gentlemen's nightcaps, the laundress being well aware of the use to which the latter were put. It was held, nevertheless, that the plaintiff was entitled to recover. "This unfortunate woman," said Buller, J., "must have clean linen; and it is impossible for the court to take into consideration which of these articles were used for an improper purpose and which were not." It is difficult, however, to see to what *proper* use a virtuous young lady could put gentlemen's nightcaps.

To defeat the plaintiff's claim in an action of this kind it is not necessary to show that he looked expressly to the profits of the prostitution for payment.

A recent case in Ireland well shows how severely the law regards this kind of immorality. On the principle *ex turpi causâ non oritur actio* it has been held that "the communication of venereal disease during illicit sexual intercourse is not an actionable wrong if the act of intercourse has been voluntary; and consent to the intercourse is not vitiated by the fact that it has been induced through wilful concealment of the disease."

Hegarty v.
Shine, L. R.
(Irel.),
July, 1879.

*Contracts Impeding Administration of the Law.***SCOTT v. AVERY.**

[55.]

[5 H. L. C.]

This was an action by a gentleman whose good ship had gone to the bottom against a Newcastle Insurance Association of which both plaintiff and defendant were members. The defendants relied on one of the rules of their association (which the plaintiff as a member had, of course, bound himself to observe), which provided that no member should bring an action on a policy till certain persons by way of being arbitrators had ascertained the amount that ought to be paid. In answer to that objection, the plaintiff contended that an agreement which ousts the superior courts of their jurisdiction is illegal and void, and that the rule relied on by the defendants was of such a nature.

This view, however, did not prevail. Judgment was given for the defendants on the ground that the contract did not oust the superior courts of their jurisdiction, but only rendered it a condition precedent to an action that the amount to be recovered should be first ascertained by the persons specified.

The pure fountains of justice are not to be corrupted. Accordingly all contracts obstructing or interfering with the administration of the law are null and void. This principle, however, must be taken with some limitation; for the compounding of certain misdemeanours is allowed, and a man may always compound his civil rights. If he has been hurt in a railway accident, for instance, he may agree that in consideration of receiving a certain sum from the company he will not bring an action against them; and this he would be precluded from doing altho' unforeseen symptoms by and by manifested themselves and entirely prostrated him.

The qualification which *Scott v. Avery* engrafts on the leading principle is that, while an ordinary agreement to refer (unless by virtue of some Act of Parliament) is no answer to an action, an

agreement that the reference shall be a condition precedent to an action is good. "The case of *Scott v. Avery*," said Kelly, C.B., in *Edwards v. 1876*, "has been quoted, and undoubtedly there is much in the language of Lord Campbell in his judgment which, taken by itself, might seem to show, as Baron Martin (in *Horton v. Sayer*, 4 H. & N.) *Aberayron Mut. Ship. Ins. Co.*, 1 Q. B. D. — I think, incorrectly—held, that it put an end to the doctrine against the ousting of the jurisdiction of the courts. But when we look to the facts of that case, and to the more cautious, and, I think, accurate language of the Lord Chancellor, the decision may well be construed to amount to no more than that where the recovery upon a policy of insurance is made expressly dependent upon the amount of the loss having been ascertained by arbitration, or upon the performance of some other legal condition, and where other subjects of controversy are also to be submitted to arbitration, no action lies until the amount of the loss is so ascertained, or the condition upon which the action may be brought has been performed. The language also of the judges, on whichever side their opinions were pronounced, is uniformly to the effect that the jurisdiction of the courts cannot be ousted by the contract of the parties, tho' the maintaining of the action may be made conditional upon the amount of loss or damage being previously ascertained, or upon some other conditions not applicable to the present case. In another recent case (in which a lessee had covenanted with his lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that, in case he kept such a number as should injure the crops, he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators or an umpire;—held, that the covenant to refer was a collateral and distinct covenant, and that the lessor might maintain an action tho' there had been no arbitration), Lord Coleridge said, "The correct view of *Scott v. Avery* is well stated in my brother Bramwell's judgment in *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex., to be this: 'If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum: for to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott v. Avery*.'" As other instances of conditions precedent which can be pleaded by the defendant in answer to an

Dawson v. Fitzgerald,
1 Ex. Div.:
and see the
very recent
case of
Collins v. Locke,
41 L. T.,
N. S.

action, may be mentioned the common clause in a building contract that the builder is only to be paid, if the architect or engineer certifies the work to have been properly done, and an agreement in the case of a horse race that the decision of the stewards shall be final. *Scott v. Corporation of Liverpool*, 3 D. & J.

The principle too must be taken subject to the 11th section of the Common Law Procedure Act, 1854, which provides that "if the parties to any deed or instrument in writing have agreed to refer any existing or future differences to arbitration, and an action is brought notwithstanding the agreement, the court, or a judge of the court in which the action is brought, may, after appearance entered by the defendant, and before plea, stay the proceedings, upon being satisfied that no sufficient reason exists why the matters agreed to be referred cannot be or ought not to be referred, and that the defendant was at the time of the suit, and still is, ready to join in the arbitration."

In a very recent case it appeared that the Birkbeck Permanent Benefit Building Society had had a dispute with one of their members. The rules of the Society said that in case of any such dispute arising, reference should be made to arbitration, pursuant to an Act of Parliament; and the member in the transactions giving rise to the dispute expressly covenanted to observe the rules of the Society. It was held, however, that these rules did not preclude the man from a right of action, as the Act contemplated only insignificant matters, and had no application when the intellect of a lawyer, and not merely the intelligence of a layman, was required to grapple with the difficulty. *Mulkern v. Lord*, 4 App. Ca.

Restraint of Trade.

MITCHEL v. REYNOLDS.

[56.]

[1 P. WMS. & S. L. C.]

Leading eastwards from that sweet thoroughfare, the Gray's Inn Road, is, or till quite recently was, a street called Liquorpond Street. In that street, something like 200 years ago, there dwelt a prosperous baker. So prosperous was he that he baked himself a fortune, and retired on it into private life. But before retiring he sold his business to the plaintiff, and executed a bond in which

he undertook not to carry on the business of a baker in the parish of St. Andrew, Holborn, for five years, under a penalty of £50. The baker did not know his own mind. Retirement suited him as little as—*si parva licet componere magnis*—it suited Sir Astley Cooper; and his fingers were everlastingly itching to be in the pudding. The end of it was that long before the five years were over he was baking away as hard as ever, and in the aforesaid parish too. Mitchel now sued the perfidious baker on the bond to recover the £50, and, what is more, he did recover it.

A contract imposing an absolute restraint of trade, no matter for how short a time, is void as being contrary to public policy. As early as Henry the Fifth's reign one of the judges flew into a passion at seeing such a bond, and used some very strong language in some very strange French. In Elizabeth's reign a similar bond was pronounced illegal, as being against the liberty of a freeman, against Magna Charta, and against the Commonwealth, one of the judges exclaiming "that he might as well bind himself that he would not go to church."

But, tho' a contract in *absolute* restraint of trade is not worth the paper it is written on, a contract in *partial* restraint of trade (that is to say, where the trading is not to take place within a certain area) may be good.

To make such a contract good two conditions must be complied with—

1. There must be a consideration. And this is necessary even tho' the contract is by deed.

2. The restraint must be a reasonable one: that is to say, it must not be greater than such as to afford a *fair protection* to the interest of the person in whose favour it is submitted to.

The reasonableness of a restraint differs according to trades and professions; whether any particular contract be reasonable or not, being a question of law for the court. Contracts that a solicitor shall not practise "in London or within 150 miles from thence," or (in another case) "in Great Britain;" that a horse-hair manufacturer shall not trade "within 200 miles of Birmingham;" that a dentist shall not draw teeth in "London;" and that a cowkeeper shall not vend milk "within five miles from Northampton Square, in the county of Middlesex," have been held to be valid contracts in partial restraint of trade; tho' it is fair to remark that some of these cases go rather far. On the other hand, "whatever restraint is larger than the necessary protection of the party can be of no benefit to either;

Bunn v.
Guy,
4 East.

Harms v.
Parsons,
32 Beav.

it can only be oppressive ; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy." Thus an agreement that a dentist—"a moderately skilful dentist"—should abstain from practising within 100 miles of York was held void, as the distance was greater than was necessary to protect the interest of the person with whom he had contracted.

In all these cases the distance is measured not by the nearest convenient route but as the crow flies—assuming the crow to go straight from point to point.

It is to be remarked, that if the restraint is reasonable as to *space*, it does not matter for how long a *time* the restraint is imposed. On the other hand, if the space were unlimited the contract would be void, tho' the time specified were only a day.

It is further to be observed, that a contract in restraint of trade may be partly good and partly bad. On this point see *Green v. Price*, p. 100.

Combinations in restraint of trade, whether of masters or of men, are at common law illegal. The great case on the subject is *Hilton v. Eckersley*, where a bond entered into by a number of Wigan mill-owners, who agreed to decide the times, wages, &c., of all their workmen, according to the resolutions of a majority of themselves, was held void. "The Trades Union Act, 1871," however, now permits a certain amount of restraint of trade.

S.L.C. says that the rule against perpetuities rests on the same ground as that against restraints of trade. And perhaps it does. But probably the student reads quite enough of that lively subject in his equity and conveyancing books. There is no great harm, however, in reminding him of the rule that the enjoyment of an estate cannot be postponed beyond a life or lives in being, and twenty-one years and nine months afterwards. Trusts for accumulation of income are regulated by the Thellusson Act, an Act passed in 1800, in consequence of a certain selfish and immoral will. That Act says (in effect) that no accumulation shall take place for longer than the lives of the grantors, or twenty-one years from the death of the grantors, or during the minority of persons living at the death of the grantors, or during the minority only of any person who under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. The Act, however, is not to apply to provisions for payment of debts, portions for children, and produce of timber. It has been held in the leading case on this statute that, tho' the trust for accumulation may exceed the periods allowed by the statute, still the direction to accumulate shall be void only so far as it exceeds those periods. But, on the other hand, if the direction to accumulate exceeds the limits allowed by law for the creation of executory interests, it shall be void altogether.

Horner v. Graves,
7 Bing.

Mouflet v. Cole, L. R.
8 Ex.

Ward v. Byrne,
5 M. & W.,
and *Catt v. Tourle*,
L. R. 4 Ch.

Hilton v. Eckersley,
6 E. & B.;
and see
the recent
case of
Collins v. Locke, 41
L. J., N.S.
34 & 35
Vict. c. 31.

Cadell v. Palmer,
1 Cl. & F.
39 & 40
Geo. III.
c. 98.

Griffiths v. Vere,
9 Ves.

Restraint of Trade, &c.

[57.]

GREEN v. PRICE.

[16 M. & W.]

Gosnell and Price, who had for some time been in partnership as perfumers, toymen, and hair-merchants, determined to separate. And the terms of their separation were the following. In consideration of £2100 Price assigned his share of the business to Gosnell, and bound himself to Gosnell, his executors, administrators and assigns, in the sum of £5000 “as and by way of liquidated damages, and not by way of penalty,” not to carry on the trade of a perfumer, toymen, or hair-merchant *within the cities of London or Westminster, or within the distance of 600 miles* from the same respectively. This covenant Price straightway proceeded to break. He set up in his old line of business in the city of London, and Green, Gosnell’s executor (for Mr. Gosnell had departed this life) brought an action against him.

Price’s counsel raised two main points:—

1. The covenant was void as an illegal restraint of trade. Even if such a restraint might be good as to London and Westminster, it could not be good as to the 600 miles radius, and its badness in that respect would vitiate the whole covenant, for it was entire and indivisible.

It was held, however, that such a contract was divisible, and might be good and binding in part, tho’ bad and void as to the rest.

2. At all events the £5000 was not to be considered really liquidated damages, and Gosnell’s executor was to recover only to the extent of the injury.

This point, too, was overruled, the court saying—“The

courts have, indeed, held that, in some cases, the words 'liquidated damages' are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain, from the whole instrument, that the real intention was different. Here, however, there is but one thing to which the £5000 relates, viz., the restriction of trade, tho' extended to two different districts; and it is plain that the parties intended that, if the restriction was violated in either district, the sum should be paid, and not that inquiry should be made as to the actual damage and loss sustained."

An illegal promise, unlike an illegal consideration, is not infectious. It is only when, through some peculiarity in the contract, they are inseparably mixed together, that the bad promises contaminate the good, and the whole contract becomes void. The case usually cited to illustrate the point that a contract in restraint of trade may be partly valid and partly void is *Mallan v. May*. But *Green v. Price* is 11 M. & W. a more useful case to remember, because it has the merit of winging 13 M. & W two birds with the same stone, illustrating not only that point, but also the rule about liquidated damages, which will be found treated more fully under *Kemble v. Farren*, p. 173. In *Mallan v. May* the defendant was engaged as an assistant to the plaintiffs, who were dentists, and promised that when he left them he would not practise as a dentist in London, or in any other place in England or Scotland where they might have been practising. This covenant was held good as to London—London being held to be *the City of London*—but void as to all the other places.

Restraint of Marriage.

LOWE v. PEERS.

[58.]

[4 BURR.]

In the ardour of his affection and the hey-day of his

youth, Mr. Newsham Peers was fool enough to sign, seal and deliver a document to this purport :—

“I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself ; if I do, I agree to pay to the said Catherine Lowe £1000 within three months next after I shall marry anyone else.”

Ten years passed away, and then the faithless swain married a girl that was not Catherine Lowe. The injured lady brought an action on the document, but after learned argument it was resolved that it was void as being in restraint of marriage. According to the view of the judges—the only sensible one—Mr. Peers’s promise had *not* been to marry Mrs. Lowe, as might seem at first sight to be the case ; but he had promised *not to marry anybody except* Mrs. Lowe : so that if that good widow from caprice or otherwise refused to marry him he would be compelled to live all his days the celibate and cheerless life of a bachelor.

There are worse things, says the Apostle, than marrying : and so thinks the law of England. Speaking of the contract between Mrs. Lowe and Mr. Peers, Lord Chief Justice Wilmot said, “It tends to evil and to the promoting of licentiousness ; it tends to depopulation, the greatest of political sins ; it is a contract *vergens ad publicam perniciem*, and therefore has a moral turpitude in it. Will the law of this country, the perfection of human reason, enforce such a contract ?” And even if the restraint is not general, but only for two or three years, there must be some good reason why the contractor should be restrained from marrying during that period.

Hartley v.
Rice,
10 East.

But a restriction against marriage with a particular specified person is not illegal ; and a husband may restrain his widow from marrying again by granting her an annuity which is to cease on her doing so.

Lloyd v.
Lloyd,
21 L. J.
Ch.

Besides making contracts in general restraint of marriage void, the law exhibits its tender regard for the hallowed institution by declaring equally void a marriage brokerage contract, that is, a contract (*e.g.* with a lady’s maid) to bring about a particular marriage. A mother once told a candidate for son-in-lawship—“You shall not have my daughter, unless you will agree to release all accounts.” He agreed, but the agreement was held to be a marriage brokerage contract, and void.

Hall v.
Potter,
3 Lev.

Hamilton
v. Mohun,
1 P. Wms.

Similarly, a contract relating to the *future* separation of a married pair is illegal and void, for such a state of things ought not to be considered likely to come about, and, indeed, the contract itself might lead to a separation ; but a contract relating to an *immediate* separation is valid, for it is necessary to make the best of a bad thing.

Hindley v.
Westmeath,
6 B. & C.

Atheism.

COWAN v. MILBOURNE.

[59.]

[L. R. 2 Ex.]

Mr. Cowan was in 1867 the secretary of the Liverpool Secular Society, and the defendant the proprietor of some assembly rooms in that town. Cowan engaged the rooms for a series of lectures to show that our Lord's character was defective, and his teaching erroneous ; and that the Bible was no more inspired than any other book. At the time the defendant let the rooms he did not know the nature of the lectures to be delivered, and when he found out, his religious sensibilities were shocked, and he declined to complete his agreement. The secularists now sued him for breach of contract, but the court decided that the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced at law. "Christianity," said Kelly, C.B., "is part and parcel of the law of the land."

"I protest," said Martin, B., "against the notion that this is any punishment of the persons advocating these opinions. It is merely the case of the owner of property exercising his rights over its use."

It is difficult to see what rational meaning can be attached to the words of Martin, B., above quoted. This was *not* "merely the case of the owner of property exercising his rights over its use." If the preaching of atheism had not been branded by the State as illegal, Mr. Milbourne would have been compelled to fulfil his contract. It

was simply because the Legislature has thought fit to punish and put down freedom of speech on a particular subject that he was permitted to shuffle out of a contract into which he had voluntarily entered. If the lectures had been on "Travels," or "Cookery," or "Big Blunders" he would have been bound to it.

"Christianity is part of the law of England." This is clear, not merely from the existence of a church establishment, but from the various punishments inflicted, or capable of being inflicted, on persons who make use of profane oaths, express heretical views, or don't go to church. In a rather excited judgment in a slavery case, Best, J., says—"The proceedings in our courts are founded upon the law of England, and that law again is founded upon the law of nature, and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it."

*Forbes v.
Cochrane,
2 B. & C*

It is satisfactory to observe that in the Criminal Code Bill there is no legislation about Sabbath-breaking. Indeed, almost the only section referring to religion at all is sect. 141, which runs as follows—"Everyone shall be guilty of an indictable offence, and shall be liable upon conviction to one year's imprisonment, who publishes any *blasphemous libel*. It shall be a question of fact whether any particular published matter is, or is not, a *blasphemous libel*: provided, that no one shall be liable to be convicted upon any indictment for a *blasphemous libel* only for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject."

This liberals, at all events, will consider a step in the right direction.

Sabbath-breaking.

[60.]

SCARFE v. MORGAN.

[4 M. & W.]

The defendant was a farmer, and circulated a printed card to the effect that a certain stalwart horse of his would be "at home" on Sundays. The stallion had a good reputation, and so Scarfe (who had before had dealings

with Morgan) sent a favourite mare to be covered by him. Some difficulty arising about payment, Morgan refused to give up the mare until all his demands were satisfied, and Scarfe brought this action of trover. One of Scarfe's main points was that the contract was illegal as having been made on Sunday. The point, however, was overruled, chiefly on the ground that the farmer's allowing his stallion to cover mares was not trading in the course of his ordinary calling, to which alone the statute referred.

"No tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day." So runs the Act of Charles the Second of pious memory, the intention of the Act being, as a judge said in 1826, "to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion;" and his lordship adds that "the Act cannot be construed according to its spirit, unless it is so construed as to check the career of worldly traffic." The words "or other person whatsoever"—on the principle that general words are to be narrowed down by particular words which precede them—have been interpreted to mean "or other person whatsoever of the 'tradesman, artificer, workman, or labourer' class." On this construction it may be remarked that since *Scarfe v. Morgan* was decided it has been held that a farmer does not come within the description "or other person whatsoever," so that the decision ought to have been in Mr. Morgan's favour on a different ground, and at an earlier period.

29 Car. II.
c. 7.

Fennell v. Ridler,
5 B. & C.

R. v. Silvester,
33 L. J.,
M. C., 79.

To make the contract void it must have been made within the person's "ordinary calling." For example, while the sale of a horse on Sunday by a horse-dealer would be void, such a sale by an ordinary person, tho' within the specified classes, would not be. So the hiring of a labourer by a farmer, and a guarantee given for the faithful services of a tradesman's traveller, have been held not to be vitiated by the contract having been entered into on Sunday. Moreover, to make the contract void, the contract must be complete on the Sunday; the statute will not apply unless everything is done to make the contract binding upon the parties.

The mere fact of the purchaser keeping goods sold to him on a Sunday will not be sufficient to make him liable to pay for them; there must also be an express promise to pay for them.

Bloxsome v. Williams,
3 B. & C.
Simpson v. Nicholls,
5 M. & W.

The leading case is also an authority on the law of lien, it having been held that the owner of a stallion has a lien on a mare sent to be

covered. Liens in law are of two kinds—particular and general. If I am a watchmaker, and you send me your watch to mend, the lien that I have on your watch till you pay for its mending, is *particular*. Such a lien exists over all goods on which the person claiming the lien has bestowed unpaid-for time and trouble, and is favoured by the law. General liens are liens in respect of a general balance due. They are not favoured by the law, and exist only by virtue of agreement or custom, or the previous dealings between the parties. Bankers and solicitors have general liens.

Wagering Contracts.

[61.]

DIGGLE v. HIGGS.

[2 Ex. Div.]

A couple of athletes named Simmonite and Diggle agreed to walk one another at the Higginshaw Grounds, Oldham, for £200 a side, Perkins to be referee, and Higgs final stakeholder and pistol-firer. The match duly came off, and Perkins decided that Simmonite had won. This decision would not seem to have met the approval of Mr. Diggle, who gave Higgs formal notice not to pay over the stakes to Simmonite, and demanded back his £200. In spite of this notice, Higgs paid Simmonite the whole £400, and became the defendant in this action.

For the plaintiff it was contended that the agreement was a wager, and therefore that he had a right to demand back the sum deposited by him before it was paid over. The defendant, on the other hand, said that the agreement came within the proviso of 8 & 9 Vict. c. 109, s. 18, which rendered lawful “a subscription or contribution for a sum of money to be awarded to the winner of a lawful game,” and his friends relied on a certain case of *Batty v.*

5 C. B. *Marriott*, where it was held that a foot-race came within the proviso.

The judges, however, overruled that case, and held that Mr. Diggle could get back his money.

In its grandmotherly care for the morals of its subjects, the Legislature in 1845 enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or *which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made*; provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise." The words italicised might at first sight seem to be fatal to a claim like Diggle's, but it had been expressly held in a previous case that they did not prevent a person from claiming back *his own* deposit at any time before it was paid over to his adversary, and on repudiating the wager.

The intention of the Act, it has been held, is to strike not merely at *unlawful* games, but at wagering even on *lawful* games; so that the proviso does not render a wager lawful because it was on a lawful game.

Varney v. Hickman,
5 C. B.

Hampden v. Walsh is an authority to the same effect as *Diggle v. 1 Q. B. D. Higgs*. A person named Hampden got it into what he called his head that it was a popular error to suppose the world was round, and advertised a challenge in the newspapers to any scientific man to prove it, each side to deposit £500 to abide the issue. The challenge was accepted by a Mr. Wallace, and the coin was duly placed in the hands of the defendant as stakeholder. Experiments were then made on the Bedford Level Canal, and eventually, of course, the referee decided in favour of rotundity, and Walsh gave Hampden notice that he should pay over the money to Wallace. Hampden, having glimmerings perhaps of the fact that he had been making a donkey of himself, objected, and demanded back his money, which, however, Walsh proceeded to pay over to Wallace. It was held in this case that Hampden was entitled to recover his deposit, the affair being a mere wager.

Altho' wagers are "null and void," they are not absolutely illegal. In one case the plaintiff had paid the defendant money to invest for him in betting on horse-races. The right horses won, and the defendant gave the plaintiff a cheque, which, however, was afterwards dishonoured. In an action on the cheque, the defence of illegality was raised, but it was held that betting on horse-races was not illegal in the sense of tainting any transaction connected with it. To take

Beeston v. Beeston,

1 Ex. Div. another case: the late unfortunate Marquis of Hastings, having lost
 See, how- a number of bets, and being threatened with proceedings before the
 ever, Jockey Club if he did not pay them, gave a bond for £10,000, and it
Higginson was held valid, as having been given, not so much in payment of
 v. *Simpson*, bets, as to avert the unpleasant consequences of not paying them.
 2 C. P. D.
Bubb v.
Yelverton,
 L. R. 9 Eq.

Impossible Contracts.

[62.]

TAYLOR v. CALDWELL.

[3 B. & S.]

In 1861 Mr. Caldwell agreed to let Mr. Taylor have the Surrey Gardens and Music Hall at Newington for four specified summer nights, on which Mr. Taylor proposed to entertain the British public with bands, ballets, aquatic sports, fireworks, and other festivities. Unfortunately, before these summer nights arrived, Mr. Caldwell's premises were destroyed by an accidental fire. Mr. Taylor had been put to great expense in preparing for his entertainment, and he submitted that, as the contract was an absolute one, Mr. Caldwell must pay damages for the breach. It was held, however, that the parties must be taken to have contracted on the basis of the continued existence of the premises, and, as they had been burnt down without the fault of either party, both parties were excused.

"You shouldn't promise what you can't perform" is a remonstrance as just as it is familiar. A man is not obliged to enter into an absolute contract. He may make his promise as conditional as he pleases, and, if he chooses to make an absolute promise when it is in his power to make a conditional one, he has only himself to blame if the consequences are unpleasant. If, for instance, the charterer of a ship were to agree to ship a cargo at a particular place, but was prevented from doing so by a frost or by an infectious disease breaking out there and all intercourse being prohibited, he would still be liable in damages to the ship-owner. At the time of its making the contract

Kearon
 v. *Pearson*,
 7 H. & N.,

was not an impossible one, and the charterer might, by the exercise of reasonable prudence, have protected himself against its subsequently becoming so. The well-known case of *Paradine v. Jane* is sometimes referred to this head. To an action for rent the defendant pleaded, "that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19th of July, 18 Car., till the Feast of the Annunciation, 21 Car." The Court considered this plea to be no answer to the plaintiff's claim, and remarked that, "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, tho' it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."

But sometimes the contract is impossible at the time of its making, and both the parties know it. Such a contract is void: there is no intention to perform it on the one side, nor expectation that it will be performed on the other. That "the obligor do go from the Church of St. Peter in Westminster to the Church of St. Peter in Rome within three hours" is the stock illustration here; but it dates from the pre-railway days, and exhibits considerable want of faith in the ingenuity of posterity. An undertaking to jump over the moon, or to run ten miles in ten minutes, would probably be held void for impossibility.

Sometimes, too, the contract is impossible at the time of its making, but the parties do not know it. For example, there may be bargaining going on about a cargo supposed to be on the voyage, but which has been already sold by reason of sea damage. Such a contract is also void, being subject to the implied condition that the cargo, as such, is still in existence. So the sale of a life annuity is impliedly conditional on the annuitant being alive at the time of the sale.

When the fulfilment of a contract for personal services is prevented by the act of God, the promisor is excused, unless it clearly appears from the terms of the contract that he was to be liable whatever happened. A musician, for instance, who undertook to play at a concert would be excused from fulfilling his engagement by a sudden illness. In a case where an eminent pianist (Miss Arabella Goddard) had disappointed an audience at Brigg, in Lincolnshire, Cleasby, B., said—"It is a duty which could not be done by a deputy, but only by the lady herself, and that being so, I think that disability or incapacity, caused by the act of God, excuses the defendant. The whole contract between the parties was based upon the assumption by both that the performer would continue living,

and *Barker v. Hodgson*,
3 M. & S.;
and see
Jones v. St. John's College,
L. R. 6
Q. B.
Aleyn.

and in sufficient health to play on the day named. This was really the very foundation of the promise, and where the foundation fails, the promise built on it must fail also." In such a case as this, the privilege of rescinding the contract is not merely that of the invalidated performer, but also that of the other party, who may decline to have a man who is too ill to do his work properly.

Robinson v. Davison,
L. R. 6 Ex.
Poussard v. Spiers & Pond,
1 Q. B. D.

As already stated, *Taylor v. Caldwell* was decided on the ground that, when the performance depends on the continued existence of the thing, a condition is implied that the impossibility arising from the accidental destruction of the thing shall excuse the performance. *Taylor v. Caldwell* has been followed in two important cases, with which the diligent student should make himself acquainted. In the former of them it had been agreed to put up some machinery on the premises of one of the parties, to be paid for when finished. In the course of the work everything was destroyed by fire. It was held that both parties were excused from further performance, and no liability accrued on either side. In the other case a Lincolnshire farmer had agreed to sell to a potato merchant 200 tons of potatoes, grown on certain land belonging to the former. Before the time for performance arrived the farmer's potatoes were attacked by the potato blight, and he was only able to deliver about 80 tons. It was held that an action to recover damages for the non-delivery of the residue of the 200 tons could not be maintained, on the ground that, as the contract was for potatoes off specific land, it was subject to the implied condition that the parties should be excused if, before breach, performance became impossible by the perishing of the thing without default of the contractor.

Appleby v. Myers,
L. R.
2 C. P.

Howell v. Coupland,
1 Q. B. D.

Negotiable Instruments.

[63.]

MILLER v. RACE.

[1 BURR. & S. L. C.]

On a dark December night about the middle of the last century the mail from London to the west was attacked by highwaymen. In reply to the usual question, most of the passengers meekly remarked that on the whole they valued their lives more than their money, and the knights of the road got away with a fair bagful. Amongst other things

taken was a bank-note for £21 10s., which a Mr. Finney of London was sending down by the general post to a client in Oxfordshire. The next day the news of the disaster reached the ears of Mr. Finney, who rushed off in wild haste to the bank and stopped payment of the note.

Not many days after the plaintiff, who had come by the note quite honestly and had given value for it, presented it at the bank; but Mr. Race, one of the bank clerks, not only refused to cash it, but even to hand it back. Miller therefore sued him, and succeeded in making him cash it.

No one can acquire a title to a chattel personal from a person who has himself no title to it. The rule is obviously a wholesome one, for the chances are that the second person would be receiving what he well knew the first had stolen. On this rule *Miller v. Race* engrafts an exception in favour of all negotiable instruments, providing that whenever a man receives one of these instruments *bonâ fide*, and having given valuable consideration for it, he is not to lose his money because the document's history is rather shady. If, however, he has received it *malâ fide*, it is different. A good-for-nothing clerk received some notes and money for his master, and went and laid them out with the defendant in illegal insurances of lottery tickets. The defendant knew that he was doing wrong, and so the clerk's master was allowed, on proving their identity, to recover them. But in such cases the *mala fides* must always be distinctly proved. It was once considered that gross negligence, supposing it to be gross enough, was equivalent to fraud; but it is now settled that negligence and fraud are two quite different conditions of the human mind.

Clarke v. Shee, Cowp.

Goodman v. Harvey, 4 A. & E.

The most familiar kind of negotiable instruments are bills and notes. There are, however, others, such as government bonds, dock-warrants, King of Prussia bonds, and the like. It is probably the fact that no instrument in England can become negotiable except by the law merchant or by statute. In 1872 a company called the Credit Foncier of England issued a debenture for £100 payable to bearer. By and by, and after a robbery, this apparently negotiable instrument got into the hands of a Mr. Crouch, who sued on it; but it was held that the company were not bound to pay it, as they had no power to issue a negotiable instrument of a novel kind. This important decision, however, must be taken subject to the later cases of *Goodwin v. Roberts*, where the scrip of a foreign government, issued by it on negotiating a loan, was held to be a negotiable instrument; and *Rumball v. Metropolitan Bank*, where, usage having been

Crouch v. Credit Foncier of England, L. R. 8 Q. B.

1 App. Ca.

2 Q. B. D.

proved, scrip certificates of shares in a banking company were held to be negotiable.

Ingham v. Primrose, 7 C. B., N.S. See, however, *Baxendale v. Bennett*, 3 Q. B. D. An instrument may be negotiable, tho' it has not been issued by the party who made it; where, for instance, an acceptor has torn up the bill with the intention of cancelling it, and the drawer has carefully pasted the pieces together, and indorsed it away. One cannot be too careful about the destruction of a cancelled bill or cheque.

Another exception to the rule that no one can acquire a title to a chattel personal from a person who has himself no title to it exists in the case of a sale in market overt. The purchaser under such circumstances is protected, and may keep stolen property (not being a horse) even against the true owner. If, however, the thief has been prosecuted to conviction, it is different: an Act of Parliament expressly provides that in that case the property stolen shall be restored to the true owner. But the construction placed on this Act is that it applies only to cases in which possession has been obtained without the property passing.

24 & 25
Vict. c. 96,
s. 100.

Lindsay v. Cundy, 1 Q. B. D., and *Moyce v. Newington*, 4 Q. B. D.; and see *Babcock v. Lawson*, 4 Q. B. D. In the country the privilege of market overt applies only to those particular days and places which may happen to be specified by charter or prescription. But in London it applies to every week-day (between sunrise and sunset) and every shop. The sale, however, must be of such articles as are usually dealt in at the shop. If a jeweller sold a pair of boots, for instance, the sale would not be within the privilege. It seems a doubtful point whether the privilege covers only the sale from shop-keeper to stranger, or extends also to the sale from stranger to shop-keeper. Most text-writers assume, somewhat hastily, the former view.

See, however, *Taylor v. Chambers*, Cro. Jac., *Lyons v. De Pass*, 11 A. & E., and *Crane v. Lond. Docks Co.*, 5 B. & S.

Notice of Dishonour.

[64.]

BICKERDIKE v. BOLLMAN.

[1 T. R. & S. L. C.]

The effect of this case (the narrative of which is too complicated to be worth detailing) is this:—Spendfast being hard up for money, and knowing the weak good-nature of his friend Lighthhead, asks him to accept a bill of exchange for him, assuring him that he will never be

called on to pay it, and that it is really only a formality. Lighthead consents, and tho' he gets no consideration whatever for it, accepts a bill drawn on him by Spendfast. The bill finally gets into the hands of Thriftman as holder, and he presents it to Lighthead for payment. Lighthead, of course, dishonours the bill, and uses strong language. Such being the state of the parties, *Bickerdike v. Bollman* decides that Thriftman, the holder, can sue Spendfast, the drawer, without having previously given him notice that Lighthead, the acceptor, has dishonoured the bill, the reason being that the drawer never had any effects in the hands of the drawee, and therefore *could not lose anything by notice not being given him.*

ORR v. MAGINNIS.

[65.]

[7 EAST.]

Maginnis was the captain of a ship engaged in the African trade, and Orr and Co. supplied him with some naval stores. By way of payment the captain drew a bill, payable at ninety days' sight, on Mullion and Co., dated January 25th, 1802, *at which time he had funds in their hands.* In July, however, when the bill was presented to them for acceptance, they had no funds of the drawer in their hands, and, like wise men, refused to accept. When the bill became due (in October) it was presented for payment and again refused. No notice was given to the drawer, and in an action against him by Orr and Co. their omission to give him such notice was held fatal to their success.

The theory on which a bill of exchange rests is that the drawee has in his possession certain effects of the drawer. Those effects the drawer will naturally wish to remove when the drawee shows by dishonouring the bill that he does not mean to pay their

price. It is for this reason that notice of dishonour is necessary. Obviously, then, when the drawer, as a fact, has no effects in the hands of the drawee, and never had, it is no hardship on him that he should receive no notice of dishonour. He has no effects to withdraw, and he was a sanguine man if he expected that his accommodation acceptor would do otherwise than dishonour.

But *Bickerdike v. Bollman* is "an excepted case, the principle of which is not to be extended." Indeed, Lord Ellenborough, C. J., said in *Orr v. Maginnis* that he knew that it had been a subject of deep regret with the very learned person who was counsel for the plaintiff in *Bickerdike v. Bollman* (Chambre, J.) that the old rule requiring notice to be given in all cases to the drawer of the non-acceptance of his bill was so far broken in upon. It is at all events refreshing to find a lawyer regretting that he won his case. In a case tried about three years ago it was held that the principle of *Bickerdike v. Bollman* cannot be extended to the case of an indorser, unless it is clearly made out that under no circumstance could he be prejudiced by want of notice.

Foster v.
Parker,
2 C. P. D.

Orr v. Maginnis is a strong case to show the necessity of notice in most cases, because at the time of the dishonour the drawer had no effects in the hands of the drawees, and therefore could not be prejudiced by the absence of notice. But there are even stronger cases. If, for instance, the drawer has consigned goods to the drawee which have not arrived, and may never arrive; if he has funds in the hands of the drawee, but to a much less value; if he could sue the acceptor or any other party; and, generally, if he has any reasonable expectation that somebody will pay the bill; he is entitled to notice. The whole period must be looked to from the drawing of the bill till it is due, and notice is requisite if at any time between those points the drawee had effects of the drawer in his hands. On the whole, therefore, if the student should ever rise to the dignity of being the holder of a dishonoured bill of exchange, we would recommend him not to rely on any of the *Bickerdike v. Bollman* class of excuses, but to give notice whether he thinks the drawer strictly entitled to it or not.

Rucker v.
Hiller,
16 East.
Blackham
v. Doren,
2 Camp.
Cory v.
Scott,
3 B. & A.
Hammond
v. Dufrene,
3 Camp.,
and
Thackray
v. Blackett,
3 Camp.

Besides, however, the case of the drawer having no effects in the drawee's hands, and never for a moment expecting that the acceptance would be honoured, there are certain other exceptional circumstances under which notice is excused. If, for example, the holder goes to the drawer's office during business hours and finds nobody there; if, in spite of due diligence, he cannot find out where the drawer lives; if he is prevented by accident or illness;—in such cases he would be excused. If the drawer makes the bill payable at his own house that is evidence of its being an accommodation bill, and notice is unnecessary. Notice, too, is unnecessary if there has been

Allen v.
Edmund-
son, 2
Exch.
Sharp v.
Bailey,
9 B. & C.

an agreement to dispense with it. Such agreement may be implied, as, for instance, where the drawer told the holder he would call at the acceptor's and see if the bill was paid. Moreover, a promise to pay is always evidence from which a jury may infer due notice. *Phipson v. Kneller*, 4 Camp.

It is to be remarked, however, that knowledge is not notice, and will not do instead of it. Even if the drawer is perfectly well acquainted with the fact that the bill has been dishonoured, he is still entitled to notice from the holder. The holder cannot excuse himself by saying it was unnecessary to tell the man what he already knew. Nor is it sufficient merely to ask for payment; the fact of the dishonour must be distinctly notified to the drawer. It is not necessary, however, that the notice should be in writing. In a case often referred to, Parke, B., said that in every notice of dishonour three facts must be distinctly conveyed to the mind of the person entitled to the notice, viz.:

1. That the bill was presented when due;
2. That it was dishonoured;
3. That the party addressed is to be held liable for the payment of it.

Lewis v. Gompertz,
6 M. & W.

MASTER v. MILLER.

[66.]

[2 H. BL. & S. L. C.]

We are not in a position to state whether the Mr. Miller who was defendant in this action was the same Mr. Miller who took the bank-note from the robber, and had a passage of arms with Mr. Race of the Bank of England. If so, he is one of the most fortunate litigants of whom there is any record. In the former case, it will be remembered, he was a plaintiff, suing on a stolen bank-note. He now appears in the humbler capacity of defendant, having accepted a bill of exchange, and resisting payment, on the ground that it has been altered since acceptance. It isn't the same bill, he says, and he won't have anything to do with it.

The history of the transaction is this. On March 26th, 1788, Peel and Co., of Manchester, drew a bill for £1000 on Miller, payable three months after date to Wilkinson and

Cooke. This bill they delivered to Wilkinson and Cooke, and Miller afterwards accepted it. Wilkinson and Cooke then indorsed it for value to the plaintiff. But, before doing so, they quietly made one or two little alterations with the object of improving the document. March 26th they changed into March 20th; and they stuck June 23rd at the top to indicate that the bill would become due on that day. These alterations, being to accelerate payment and unauthorized, were held to vitiate the instrument;—a decision which, tho' obviously perfectly just, bore, perhaps, a little hardly on Mr. Master, who knew nothing whatever of the alterations.

[67.]

ALDOUS v. CORNWELL.

[L. R. 3 Q. B.]

In November, 1865, Mr. Cornwell gave his promissory-note to this effect—"I promise to pay Mr. Edward Aldous the sum of £125." By and by Mr. Aldous asked Mr. Cornwell to pay the £125. Mr. Cornwell was about to do so when he noticed that two words had been added to the note he had made, so that it now ran "*On demand* I promise to pay, &c." Mr. Cornwell on this refused to pay, pleading that he "did not make the note as alleged." The result of an action, however, was that he was compelled to pay, as the alteration was an immaterial one, all notes which express no time for payment being payable "on demand."

"It seems to us," said the court, "repugnant to justice and common sense to hold that the maker of a promissory-note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written."

The law with its exactness and suspiciousness looks with disfavour on the alteration of written instruments. Even when the alteration

is made with the consent of both parties (unless made merely to correct a mistake and render the instrument what it has all along been intended to be) there must be a new stamp as for a new contract.

One of the earliest, and for a long time the most important case, on the subject of alteration without consent is *Pigot's case*. That case 11 Co. referred only to deeds, but its principle was afterwards extended to bills of exchange, guarantees, bought and sold notes, charter parties, and other instruments. But the part of the second resolution of *Pigot's case* which says that "if the obligee himself alters the deed, altho' it is in words not material, yet the deed is void," was expressly dissented from in *Aldous v. Cornwell*.

Not only does a material alteration by the holder vitiate an instrument, but so also does a material alteration by a stranger, and this even tho' the alteration is made without the knowledge of the holder of the instrument. The moral clearly is that one must keep all important documents under lock and key. Alterations by accident (*e.g.*, by a mischievous little boy tearing off a seal, or by rats eating it) or mistake do not affect the liability. In one well-known case it appeared that three persons had made their joint and several promissory-note "with lawful interest." The holder persuaded two of them, in the absence of the third, to add in the corner, by way of explanation, "interest at 6 per cent." It was held that he could not recover against the third party, as the note had been materially altered. A recent case of some importance on the subject is *Vance v. Lowther*, where a dishonest clerk had absconded with a cheque drawn in his master's favour. After altering the date from March 2nd to March 26th, he passed it to the plaintiff for value. It was held that the alteration was material, and invalidated the cheque, so that the plaintiff, in spite of having acted prudently and uprightly, could not successfully sue the drawer. In this case it was laid down that materiality is a question of law for the Court, and that in deciding it reference is to be had to the contract alone, and not to the surrounding circumstances.

The instrument may be given in evidence for a collateral purpose, altho' vitiated by a material alteration. A landlord once brought an action against a tenant for not cultivating according to the terms of the written agreement between them. The written agreement when produced was found to be stained with an erasure in the habendum, the term of years having been altered from seven to fourteen. As a matter of fact the defendant was a yearly tenant under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, so it did not matter whether the written agreement said 14 or 140 years. For this reason the instrument was admitted in evidence to prove the terms on which the tenant held the land.

Raper v. Birkbeck,
15 East,
and *Argoll v. Cheney*,
Palm. But see *Davidson v. Cooper*,
11 M. & W.
Warrington v. Early,
2 E. & B.
1 Ex. Div.

Falmouth v. Roberts,
9 M. & W.

Warranties, &c.

[68.]

LOPUS v. CHANDELOR.

[CRO. JAC. & S. L. C.]

In the days when superstition was rife—for it was half a century before Sir Matthew Hale began to burn witches—it was generally thought that a bezoar stone was a charm against most of the ills of life; and such stones accordingly fetched big prices. Mr. Lopus had a pardonable desire to be exempt from as many of the ills of life as possible, and went to Chandelor's shop—Chandelor was a jeweller—and paid £100 for a stone that the tradesman distinctly told him was a bezoar. Mr. Lopus went away a happy man, but after a short time, finding he was not so free from the ills of life as he expected to be, his suspicions were aroused. He made inquiries, and discovered that his fancied treasure was not a bezoar at all, and was decidedly fitter for mending the highway than for curing anybody's neuralgia.

Under these circumstances, Lopus went to law with the jeweller who had sold him the stone. But he failed, for he was unable to give satisfactory answers to two questions which their lordships put to him, viz. :—

1. *Did Chandelor WARRANT this stone to be a bezoar?*

“No,” replied Lopus, gloomily, “I can't say he exactly warranted it. But he certainly *said* it was a bezoar.”

“Very likely,” said the court, “but *saying* isn't *warranting*. You cannot recover in contract.”

2. *Did Chandelor, when he told you it was a bezoar, KNOW that it was not?*

“How on earth can I tell,” replied Lopus, “what the man knew, or did not know?”

"Then," said the court, "neither can you recover in tort."

The probabilities are, that if Lopus had been a litigant of to-day, he would have succeeded on both points. He would have hit the tradesman *in contract* because "every affirmation at the time of the sale of a personal chattel is a warranty if it appears to have been intended as such," and Chandelor's assertion that the stone was a bezoar would no doubt be considered sufficient. He would have succeeded *in tort* because the fact that the defendant was a jeweller would be damning evidence that he knew one stone from another.

Crosse v. Gardner,
Carthew v. Medina v. Stoughton,
Salk.; and see re-marks of Buller, J., in *Pasley v. Freeman*, p. 215.

It is often a difficult matter to decide whether the seller intended his representation to be a warranty or not. The test to determine his intention is, did he assume to assert a fact of which the buyer was ignorant? If he did, he warranted. Two well-known picture-dealing cases illustrate this distinction. In one of them the seller, at the time of sale, gave the following bill of parcels:—"Four pictures, views in Venice, Canaletto, £160." It was held that the jury might very well find that the words imported a warranty that Canaletto had painted the pictures. In the other case, a sea-piece and a fair had been sold, the former being catalogued as by Claude Loraine, and the latter by Teniers. It was held that, as these artists had lived so long ago, that nobody could be really sure whether any particular painting was by one of them or not, the seller could not be taken to have asserted a fact, but had merely expressed *his opinion* on the subject; therefore, he had not warranted.

Power v. Barham,
4 Ad. & E.

The courts have sometimes considerable difficulty in getting at the intention of the seller. In one case the receipt ran as follows:—

Jeudwine v. Slade,
2 Esp.

"Received by Mr. Budd £10 for a grey four-year-old colt, warranted sound in every respect."

It was held that this warranty referred only to the *soundness*, and that the *age* was mere matter of description. In another case the seller of a mare said "he never warranted; he wouldn't even warrant himself;" but the mare was "sound to the best of his knowledge." It turned out that the mare was unsound, and that the seller knew it. It was held that he must be taken to have warranted that the mare was sound *to the best of his knowledge*.

Budd v. Fairmaner,
8 Bing.

The vendor may, of course, place limitations on the warranty he gives. At a horse repository, for instance, there was a notice stuck up on a board to the effect that warranties given there should remain in force only till twelve o'clock the next day, unless before that time the horse sold was proved to be unsound. It was held that purchasers were bound by this notice

Wood v. Smith,
5 M. & Ry.

Bywater v. Richardson,
1 Ad. & E.

Warranty must be during Treaty for Sale.

[69.]

HOPKINS *v.* TANQUERAY.

[15 C. B.]

Mr. Tanqueray advertised his horse "California" for sale at Tattersall's. The day before the sale, happening to go there, he found his friend Hopkins kneeling down and carefully scrutinizing "California's" legs, whereupon he remarked, "My dear fellow, you needn't examine his legs; you have nothing to look for; I assure you he's perfectly sound in every respect;" to which Hopkins replied, "If you say so I am perfectly satisfied," and immediately got up. The next day Hopkins attended the sale, and bought the horse, having, as he said, determined to do so because of Tanqueray's positive assurance that he was sound. There was no written warranty, and it was admitted that when Tanqueray said the horse was sound he quite believed it was. Hopkins now sought to make out that Tanqueray's assertion on the day before the sale was equivalent to a warranty. It was held, however, that that assertion *formed no part of the contract of sale*, and therefore did *not* amount to a warranty.

The plaintiff made no imputation of fraud here. He sued in contract not in tort, his point being that tho' the auctioneer had put the horse up without warranty, what the defendant had said to him the day before the sale amounted to a private warranty. The reason why this view was not adopted was that Tanqueray's words on that occasion formed no part of the contract; and a warranty is essentially part of the contract, and must be given, if at all, at the time of the sale.

So, too, a warranty given *after* a sale is void unless there is a new consideration. If a man *after* he has sold a horse warrants the purchaser that it is sound, that warranty will not be binding on him unless the purchaser does or suffers something more as a consideration;

the first consideration being exhausted by the transfer of the horse *without* a warranty.

When the terms of a contract have been reduced to writing, no oral representations can be relied on as a warranty. During some negotiations for the sale of a ship, the seller represented her as being copper-fastened. She was not so described, however, in the written contract that was afterwards entered into; and it was held, therefore, that the unfortunate purchaser had received no warranty of the vessel's being copper-fastened. "I hold," said Gibbs, J., "that if a man brings me a horse, and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations; and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case."

Roscorla v. Thomas,
3 Q. B.

Pickering v. Dowson
4 Taunt.

General Warranty does not cover obvious Defect.

MARGETSON v. WRIGHT.

[70.]

[7 BING.]

Wright sold Margetson his horse "Sampson," warranting the said horse to be "at this time of sound wind and limb." In spite of this warranty "Sampson,"—as Wright informed Margetson, and as was obvious,—was suffering from a splint. The jury expressly found "that altho' the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint." But some splints cause lameness and others do not, and at the time of the warranty it was entirely uncertain what would be the issue of Sampson's splint.

The question was whether a general warranty like the above extends to obvious defects whereof the consequences are uncertain, and it was held that it *does*, and that Wright was therefore liable to Margetson.

The rule is that a general warranty does not extend to obvious defects. If I sell you a horse warranting that it is sound and perfect in every respect, when we can both of us see that it has no tail, you cannot bring an action against me for breach of warranty on the ground of the missing appendage. On this rule *Margetson v. Wright* engrafts the exception that where the defect is obvious, and yet not of a permanently injurious character, it shall be covered by a general warranty.

A person who takes a horse with a warranty is not bound to use extreme diligence in discovering defects. This was decided in a case in which a man had bought a horse with "an extraordinary convexity of the corner of the eye," which produced short-sightedness, and made the animal liable to shy.

Holliday
v. *Morgan*,
1 E. & E.
9 M. & W.

The leading case as to the meaning of the word "soundness" in a warranty is generally considered to be *Kiddell v. Burnard*, where it was held that it is not necessary to constitute unsoundness that the horse should be *permanently* unfit for use; it is sufficient "if at the time of the sale the horse has any disease, which either does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has, either from disease or accident, undergone any alteration of structure that either does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound."

Implied Warranty of Title.

[71.]

MORLEY v. ATTENBOROUGH.

[3 EXCH.]

The defendant in this case was the eminent pawn-broker of that name. A person named Poley having hired a harp of Messrs. Chappell, music sellers, pledged it with the eminent firm for £15 15s. on the terms that if the sum advanced were not repaid within six months they should be at liberty to sell it. The harp not being redeemed within the stipulated time, Attenborough sold it to the plaintiff. All this came to the ears of Messrs.

Chappell, who got back their harp from Morley ; and that gentleman, to recoup himself, now brought an action against the pawnbroker, alleging that the harp was sold to him with an implied warranty of title. This view, however, did not prevail, for the judges decided that in the absence of an express warranty all that the pawnbroker asserted by his offer to sell was that the thing had been pledged to him and was unredeemed, not that he was the lawful owner.

Morley v. Attenborough is supposed to be the chief authority for the rule that on the sale of a chattel personal there is no implied warranty of title. Supposing there really to be such a rule, which is perhaps a moot point, it may be said to be pretty well "eaten up by the exceptions." For example, the sale of goods *in a shop* or in a warehouse imports an implied warranty of title. The case of *Eicholz v. Bannister*, where a Manchester job warehouseman in his warehouse sold the plaintiff a quantity of woollen goods which he described as "a job lot just received by him," is the leader of the exceptions ; and the effect of that case is, as Mr. Benjamin says, to make the rule really this. "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." Per Lord Campbell, in *Sims v. Marryat*, 17 Q. B., 17 C. B., N. S.

One of the latest cases is *Bagueley v. Hawley*. The tenants of a Staffordshire colliery would not or could not pay a poor-rate. A distress, therefore, was made upon them, and, amongst other things, a big boiler was seized, but was not removed. The defendant bought it at a public auction, and then sold it at an advanced price to the plaintiffs, giving them full information as to where it was and how he came to have the right to sell it. The mortgagees of the premises prevented the plaintiffs from removing this boiler, and so the latter went to law with the defendant for an alleged implied warranty of title. In this enterprise, however, they were not successful, in spite of *Eicholz v. Bannister*. Chiefly on the authority of *Morley v. Attenborough*, it was decided that the defendant had entered into no such engagement as was suggested. "I consider the general rule to be," said Bovill, C.J., "that upon the sale of goods there is no warranty of title implied by law ; and I do not find any evidence or proof of any circumstances to take this case out of the ordinary rule." Benj. Sale of P. P., 2nd ed., p. 523.

Implied Warranties.

[72.]

JONES v. JUST.

[L. R. 3 Q. B.]

Jones and Co., Liverpool merchants, agreed to buy from Mr. Just, a London merchant, a number of bales of Manilla hemp which were expected to arrive in some ships from Singapore. The hemp did arrive, but, when it was examined, it was found to be so much damaged that it would not pass in the market as Manilla hemp; and Jones and Co., who had paid the price before the ships arrived, had to sell it at 75 per cent. of the price which similar hemp would have realized if undamaged. This was an action by them against the seller, who was admitted to have acted quite innocently in the matter, to recover the difference; and it was held that he must pay it, on the ground that in every contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only correspond to the specified description, but must also be saleable or merchantable under that description.

The maxim *caveat emptor* generally applies as to the quality of goods sold, and unless there is an express warranty there is no warranty at all.

But a warranty is implied in the following cases:—

1. When goods are sold by a trader for a particular purpose of which he is well aware,—*e.g.*, copper for sheathing a ship,—they must be reasonably fit for the purpose.

Gray v.
Cox, 4 B.
& C., and
Jones v.
Bright,
5 Bing.

7 H. & N.

A case often referred to is *Bigge v. Parkinson*, where a provision dealer had undertaken to supply a troop-ship with stores for a voyage to Bombay, guaranteed to pass the survey of certain officers, but with no warranty of their being fit for the purpose. It was held, however, and in spite of the guarantee, that such a warranty must be implied.

The implied warranty of this class covers, it has been held, latent undiscoverable defects.

2. When the contract is to furnish manufactured goods, they must be of a merchantable quality.

3. In the case of a sale by sample, there is an implied undertaking that the sample is fairly taken from the bulk.

But no further warranty (unless it would have arisen if the sale had not been by sample) is implied. In the well-known case of *Par-kinson v. Lee* the defendant sold the plaintiff a quantity of hops by sample. The bulk fairly answered to the sample; but both sample and bulk had a latent defect, which made the purchase useless to the plaintiff. It was held that there was no implied warranty that the hops were merchantable or good for anything.

4. The custom of a particular trade may raise an implied warranty.

5. Under the circumstances of the leading case. That is to say, where goods are sold by description, and the buyer has not seen them, there is an implied warranty, not only that they answer the description, but that they are merchantable.

As Lord Ellenborough graphically said in one of the earliest cases on the subject, "The purchaser cannot be supposed to buy goods to lay them on a dunghill."

6. By the Merchandise Marks Act, 1862, a warranty of genuineness is to be implied from a trade-mark or description.

In a very recent case the question arose (not for the first time) whether, on the sale of meat, there is an implied warranty that it is fit for human food. But the buyer had selected the meat himself in the market, relying on his own judgment, and so it was held that, however desirable it may be that the public should not be poisoned, there was nothing to take the case out of the ordinary rule that, *on the sale of a specific article, where the purchaser has an opportunity of inspection, and the seller is not the manufacturer, there is no implied warranty.*"

A curious case on implied warranty is *Thorn v. London*. The Corporation of London wanted to take down Blackfriars Bridge and build a new one. Accordingly they prepared plans and a specification, and asked for tenders. A Mr. Thorn contracted to do the work, and set about it. When he had got some way, however, it turned out that a part of the plan, which consisted in the use of caissons, could not be adopted, and finally Mr. Thorn found it necessary to go to law with the corporation for the loss of time and trouble occasioned by the failure of the caissons. It was held, however, that there was no implied warranty that the bridge could be built according to the plans and specification, and that the defendants were not liable.

Randall v. Newson,
2 Q. B. D.
Living v. Fidgeon,
6 Taunt.

Heilbutt v. Hickson,
L. R.
7 C. P.
2 East.

Jones v. Bowden,
4 Taunt.

Gardiner v. Gray,
4 Camp.
25 & 26
Vict. c. 88,
ss. 19 & 20.

Smith v. Baker, 40
L. T., N. S.,
following
*Emmer-
ton v. Matthews*,
7 H. & N.
1 App. Ca.

Warranties and Representations.

[73.]

BEHN v. BURNES.

[3 B. & S.]

This was an action by a ship-owner against a charterer for not loading. In the charter-party the plaintiff had described himself as "owner of the good ship or vessel called the *Martaban*, of 420 tons or thereabouts, *now in the port of Amsterdam*." Unfortunately the good ship the *Martaban* was *not* just then "in the port of Amsterdam;" and the question was whether the words were a warranty or merely a representation. It was held that they were a warranty, and therefore that the plaintiff had not fulfilled his part of the contract.

The question of whether warranty or representation is one of intention, and to get at the intention all the circumstances must be looked at. Of course, when a *representation* turns out to be false, an action for damages lies on it, but the breach of a representation has not the same effect as the breach of a warranty in putting an end to the contract.

If a ship is described in the charter-party as being A 1, that amounts to a warranty of the class; but it is only a warranty that the ship is so classed at the time of the contract, and is not broken by the ship's losing the class before arrival at the port of loading.

Hurst v.
Usborne,
18 C. B.
10 C. B.,
N. S.

An important case which was decided about the same time as *Behn v. Burnes* is *Bannerman v. White*, an action by a hop-grower against a hop-merchant for the price of hops sold to him. The Burton brewers, rightly or wrongly, had got it into their heads that the quality of their beer had deteriorated through the employment of sulphur in the cultivation of hops, and had the year before sent a circular round to all the growers saying that they wouldn't buy any more hops which had had sulphur applied to them. This being so, at the very commencement of the negotiations between the plaintiff and the defendant, the latter asked the former if any sulphur had been used, adding that, if any had, he must decline to consider any

offer. The plaintiff replied that none had been used, and so the defendant agreed to purchase the year's crop. As a matter of fact, the plaintiff had used sulphur to about five acres of the hops (the whole growth being 300 acres), having done so for the purpose of trying a new machine called a sulphurater; and had afterwards mixed the sulphured and unsulphured hops all up together. The jury found that the hop-grower had not acted with intent to deceive, and that the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff. On these facts it was held that the defendant was entitled to repudiate the contract.

The following remarks from Sir W. Anson's "Law of Contracts" P. 133. may be usefully quoted:—"The determination of the courts to exclude representations from affecting a contract unless they form a part of its terms is an instance of the practical wisdom which marks the English Law of Contract. The process of coming to an agreement is generally surrounded by a fringe of statement and discussion, and the courts might find their time occupied in endless questions of fact if it were permitted to a man to repudiate his contract, or bring an action for the breach of it, upon the strength of words used in conversation preceding the agreement. When, therefore, the validity of a contract is called in question, or the liabilities of the parties said to be affected by reason of representations made at the time of entering into the contract, the effect of such representations may be said to depend on the answer that can be given to three questions:—

"1. Were the statements in question a part of the terms of the contract?

"2. If not, were they made fraudulently?

"3. If neither of these, was the contract in respect of which they were made, one of those which we will call for convenience contracts *uberrimæ fidei*?

"If all these questions are answered in the negative, the representation goes for nothing."

Necessaries for Infants.

PETERS v. FLEMING.

[74]

[6 M. & W.]

Mr. Fleming was one of those fast undergraduates whose efforts have contributed so liberally towards the

settlement of the law of "necessaries" for infants. During his career at Cambridge, and while under age, he became indebted to a tradesman of the town for rings, pins, a watch, and various other articles, which were supplied to him on tick. Papa, who was a wealthy M.P., and could easily pay if he liked, wouldn't look at the bill; and so the tradesman brought an action against the young man himself, when he came of age, and,—perhaps rather to his own surprise,—got his money. "The true rule," said Parke, B., "I take to be this, that all such articles as are *purely ornamental* are not necessary and are to be rejected, because they cannot be requisite for anyone; and for such matters, therefore, an infant cannot be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party in order to support himself properly in the degree, state and station of life in which he moved; if they were, for such articles the infant may be responsible."

[75.]

RYDER v. WOMBWELL.

[L. R. 4 Ex.]

Mr. Wombwell was the younger son of a deceased Yorkshire baronet, and "moved in what is called the highest society." During his minority he had £500 a year, and when he came of age would be entitled to a lump sum of £20,000; so that he may be said to have been, as times go, in pretty affluent circumstances. He was a friend of the Marquis of Hastings, and occasionally rode races for that unfortunate young nobleman. While yet a minor he ordered of Ryder and Co., the jewellers, a silver gilt goblet of the value of £15 15s., and a pair of studs of the value of £25. The studs were for the boy's own

wearing, but the goblet was intended, with a loving inscription, as a present to the Marquis. To an action for the price of these articles, Wombwell, considering perhaps that he had been imposed on, set up the defence of "infancy," to which the reply was "necessaries."

At first the judges thought the studs were "necessaries," tho' not the goblet; but it was finally resolved that neither the studs nor the goblet were necessaries; so, as they would have said in the good old times, *Postea* to the defendant.

The law considers it extremely desirable that in every contract both parties should know what they are doing; in other words, that there should be a concentration of minds on the same point. The experience of the law, moreover, teaches it that young men,—especially undergraduate young men,—are extremely foolish, and need its watchful protection none the less because they scorn the imputation of infancy, and regard themselves as very knowing men of the world. It would be too much to say that infants should not be allowed to enter into a contract at all; they might perish with hunger. But they cannot contract so as to bind themselves for anything except "necessaries."

Meat, drink, clothes, medicine, and the like,—such things as are essential to human existence,—are what the lay mind would understand by "necessaries." But in process of time the word has acquired a technical meaning which cannot be ascertained in a particular instance without reference to the cases. Amongst things held to be "necessaries" may be mentioned a servant's livery, a volunteer uniform (in perilous times), horse exercise; while, on the other hand, a chronometer costing £68, cigars and tobacco, and dinners out of college have been held not to be "necessary." The result of those cases may be said generally to be that in every "necessaries" case this question should be asked, "Could the defendant have lived comfortably in that station of life which it has pleased, &c., without it?" If the answer to that question is "No," the article is a "necessary" one, and the young gentleman must pay for it. A fancy dress suit may be suggested as an article just on the line dividing necessaries from non-necessaries—assuming of course that the infant's position is what it should be.

It is not quite clear whether the defendant in a case of this kind may show, in answer to the plaintiff's claim, that he was already plentifully supplied with the articles alleged to be "necessaries." It

Hands v. Slaney,
8 T. R.
Coates v. Wilson,
5 Esp.
Hart v. Prater,
1 Jur.
Berolles v. Ramsay,
Holt N. P.
Bryant v. Richardson,
14 L. T., N. S.
Brooker v. Scott,
11 M. & W.

Bainbridge v. Pickering, 2 W. Bl.; and see *Ford v. Fothergill*, Peake, N. P. C. is the better opinion, however, that he *can*, and that it does not in the least matter that the plaintiff was ignorant of the fact.

Whether the articles for the price of which the plaintiff sues are "necessaries" or not, is a question of fact, and therefore for the jury. But like all other questions of fact it will not be left to them if their finding in the affirmative would be manifestly contrary to the evidence. This is well, because a jury is generally composed chiefly of tradesmen, and their sympathies are naturally with the plaintiff in a "necessaries" case.

At law it is no answer to a plea of infancy that at the time of the contract the defendant cheated the tradesman into the belief that he was of full age. In equity, however, fraud is fraud, even in an infant.

37 & 38 Vict. c. 62. By an Act passed in 1874, and called the "Infants Relief Act," contracts by infants for the repayment of money lent, or for goods supplied (not being necessaries), and all accounts stated with infants are declared absolutely void; and it is also provided that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." A curious point lately arose under this Act. A young fellow under twenty-one promised to marry a girl. When he came of age he kept on courting and spooning her as if his sentiments were unchanged, but did *not* renew his promise. He then—men were deceivers ever—jilted her. In an action by the young lady for breach of promise, it was held that the defendant was saved by the new Act. He had not made a fresh promise, and, by virtue of the Act, he was incapable of ratifying his old one. In the still later case of *Northcote v. Doughty* the defendant on coming of age had said, "Now I may and will marry you as soon as I can," so that there was plenty of evidence of a fresh promise.

Coxhead v. Mullis,
L. R. 3
C. P. D.
4 C. P. D.

In a very recent case in Ireland it has been held that an indorsee for value can maintain an action against the acceptor of a bill of exchange, accepted by the latter after coming of age for a debt contracted during infancy, and after the passing of the above Act, tho' not in respect of necessaries.

Belfast Banking Co. v. Doherty,
L. R. (Ir.),
Apr. 1879.

Altho' an infant cannot (except for necessaries) contract so as to bind *himself* yet he binds *the other party*, infancy being "a personal privilege of which no one can take advantage but the infant himself." Thus, if a boy of eighteen and a buxom widow of forty were to agree to marry one another, the boy could go to law against the widow, but not the widow against the boy.

Holt v. Ward,
2 Str.

A curious point in the law of infancy lately came before the Court

of Crown Cases Reserved. A person was tried and convicted at the Hull sessions for an offence against the Debtors Act. The point taken by his counsel was that, whereas the prisoner was an infant, the debts were trade debts and not for necessities, and therefore he had really no creditors amongst whom the sum of money charged against him ought to have been divided. On this ground the conviction was quashed.

*Reg. v.
Wilson,
Weekly
Notes,
Nov. 29th,
1879.*

Contracts of Lunatics.

BAXTER v. PORTSMOUTH.

[76.]

[5 B. & C.]

On various occasions between 1818 and 1823 the Earl of Portsmouth hired carriages and horses from the plaintiff, and thereby incurred the bill for which this action was brought. It was proved that the plaintiff had no reason to suppose his lordship to be of unsound mind; and that the carriages, &c., were constantly used by him, and were suitable to his rank and station. This being so, the plaintiff's claim was not defeated by its having been found in 1823 by a commission that the Earl "then was, and from the 1st of January, 1809, continually had been of unsound mind, not sufficient for the government of himself."

Two propositions seem clear :—

1. A lunatic is never liable on an *executory* contract, whether for necessities or not. But the better opinion is that such a contract is not void but voidable, so that, if reason resumes its sway, it may be confirmed.

*Matthews
v. Baxter,
L. R. 3 Ex.*

2. A lunatic is sometimes liable on *executed* contracts. He is liable on executed contracts for *necessaries*, if no advantage has been taken of him, even tho' the person supplying him with them was aware of his melancholy condition. If it were not so, "the consequence might be that, notwithstanding the possession of large estates, such a person might be left to casual charity, thrown upon the parish, or exposed to starvation." But he is also liable on all fair and *bonâ fide* executed contracts in the ordinary course of life (*e.g.*, for the sale

Molton v. Camroux,
4 Exch.
Drew v. Nunn, 40
L.T., N.S.;
and see
Chappell v. Nunn, an
action
against the
same
defendant
in Ireland,
41 L. T.,
N. S.

of an annuity) when the other contracting party believed himself to be dealing with a sane man, and the transaction has gone so far that the *status quo ante* cannot be restored.

It has lately been decided that "where a principal holds out an agent as having authority to contract for him, and afterwards becomes lunatic, he is liable on contracts made by the agent after the lunacy with a person to whom the authority has been so held out, and who had no notice of the lunacy;" but that "the lunacy of a principal, if so great as to render him incapable of contracting for himself, puts an end to an authority to contract for him previously given to his agent."

Contracts of Corporations and Appropriation of Payments.

[77.]

ARNOLD v. MAYOR OF POOLE.

[4 M. & Gr.]

Corporations, remarks my Lord Coke in one of his luminous treatises, have neither bodies to be kicked, nor souls to be dealt with by and by. This being so, they can do with impunity things that individuals cannot. Mr. Arnold was a solicitor, and did some work for the Poole corporation about forty years ago. But tho' the corporation had passed a resolution directing the work to be done, and tho' they knew perfectly well of its progress, yet when the time came to pay they absolutely declined to do so; and successfully sheltered themselves beneath the pitiful defence that the contracts of a corporation are not binding unless made under its corporate seal.

[78.]

CLARKE v. THE CUCKFIELD UNION.

[21 L. J., Q. B.]

At a regularly constituted meeting of the Board of Guardians, an order was given to Mr. Clarke to put up

some w.c.'s in the workhouse, and this order Mr. Clarke forthwith proceeded to execute. When, however, the work was finished, the guardians refused to pay for it, defending themselves on the technical ground that there was no contract under seal. But it was held that sealing was unnecessary, as the purposes for which the guardians were incorporated obliged them to provide water-closets, paupers requiring such conveniences as much as other people; and, besides, the contract was an executed one, and it would be the height of injustice that the corporation should keep the benefit of the contract while it impugned its validity.

Cockburn, C.J., has branded the rule that a corporation can only bind itself by deed as "a relic of barbarous antiquity." But "the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerous attended, is after all not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times."

Ludlow v. Charlton,
9 C. & P.

"Convenience amounting almost to necessity" is the principle on which the exceptions are founded. In the small matters of everyday life so much formality as the rule requires would be intolerable. Corporations cannot be always sealing any more than Mr. Apollo can always be practising archery. An inferior servant, for instance, may always be engaged by parol: the corporation would be bound by such a contract, seal or no seal. Moreover, when a company is incorporated for trading purposes, it may make all such contracts as are of ordinary occurrence in that trade, irrespective of the magnitude of the particular transaction, without seal; and contracts on behalf of a joint stock company registered under 25 & 26 Vict. c. 89 (the Companies Act, 1862) may now, by virtue of 30 & 31 Vict. c. 131, c. 37, be generally made without seal.

South of Ireland Colliery Co. v. Waddle,
L. R. 4 C. P.

On the same principle that *Clarke v. Cuckfield Union* was partly decided, viz., that the defendants had had the benefit of the contract, it has been held that a corporation can sue a tenant who has occupied their lands without deed for use and occupation; the promise, the court pointed out, was not an express but an implied one.

Stafford v. Till, 4 Bing.

But when a statute constituting a corporation provides that its contracts shall be made under seal, a contract is void unless so made, and, tho' work has been done, it need not be paid for. This point was decided in the recent case of *Hunt v. The Wimbledon Local Board*, 4 C. P. D.

from which *Clarke v. The Cuckfield Union* seems to have been distinguished, on the ground that the defendants had derived *no benefit* from what Mr. Hunt had done for them—the preparation of plans. “Even independently of the statute,” said Brett, L.J., “I am of opinion that the plaintiff cannot recover. But I am further of opinion that the statute in this case is conclusive, and it seems to me that the statute is clearly more than *directory*. It is what has been called *mandatory*. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this: The Legislature, knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what *were* small matters, and to say that contracts which the board would not otherwise be authorised to make might be made for amounts less than £50—that is to say, that if they were necessary and under £50, they should be brought within the recognised exception as to small matters, and that if they were over £50, the mere fact of their being over £50 would prevent their coming within the exception.”

Arnold v. Poole may be usefully remembered as an authority on the subject of *appropriation of payments*. When a man owes another a number of different debts and makes a payment, he has the right to apply it to any of the debts he pleases. If, however, the debtor fails to specify the particular debt he is paying, the creditor may appropriate the payment to any debt he pleases, even to one for which (because, for instance, barred by the Statute of Limitations, or, as in *Arnold's* case, due in virtue of a contract which ought to have been by deed and is not) he could not successfully maintain an action. If appropriation is made neither by debtor nor creditor, the law generally appropriates it to the earliest debt, commencing with the liquidation of any interest that may be due.

Clayton's
case,
1 Mer.

Life Insurance.

[79.]

HEBDON *v.* WEST.

[3 B. & S.]

This was an action against an insurance society. The plaintiff had been for many years a clerk in a bank at Preston, and had proved very useful to his employers, of

whom a gentleman named Pedder was the senior and managing partner. Pedder was much pleased with the man, and promised him two things,—one, that he would not, during his life, enforce payment of a debt of £4000 or £5000 which Hebdon owed the bank, and the other, that he would pay him an increased salary of £600 a year during the next seven years. Careful man that he was, Hebdon obtained Pedder's permission to insure the latter's life in respect of these promises, and the chief question now was whether the insured had such a pecuniary interest in Pedder's life as to satisfy 14 Geo. III. c. 48. It was held that in respect of the £600 a year salary he had, but not in respect of the other promise. It was held also that a person cannot recover from an insurance company more than the amount of his insurable interest in the life of the person insured.

DALBY v. INDIA AND LONDON LIFE INSURANCE CO. [80.]

[15 C. B. & S. L. C.]

The effect of this case (the facts of which are too complicated to be worth retailing) is to overrule *Godsall v. Boldero*,^{9 East & S. L. C.} and to decide that a contract of life insurance is not, like that of fire insurance or marine insurance, a contract of indemnity merely, but entitles the assured to receive the exact sum for which he has insured, no matter how much in excess of his real loss it may be, assuming, of course, that an insurable interest to the extent of the sum for which the insurance was effected duly existed at the time the policy was entered into.

14 Geo. III. c. 48, s. 1, provides that no insurance shall be made by any person on the life of another, unless the person for whose sake the policy is made has an "interest" in that life. What, then, is an "interest"? In the first place, a man is presumed to have an interest in his own life. But, on the other hand, if it can be shown

- that a man is insuring his life with another person's money, and for that other's benefit, the policy will be void, for it is then nothing more than an attempt to evade the statute. A creditor may insure his debtor's life, and, even tho' the debt is afterwards paid, may recover the money from the insurance office. A trustee may insure for the benefit of his *cestui que trust*, and (tho' the converse does not hold good) a wife is taken to have an interest in her husband's life.
- Wainwright v. Bland*, 1 M. & Rob. The Married Women's Property Act, 1870, gives power to a married woman to effect a policy on her own or her husband's life for her separate use, and provides that, if a husband insures his life in a policy expressed on the face of it to be for the benefit of his family, it shall be deemed a trust for them, and incapable of being touched by himself or his creditors. But, apart from these cases, the interest required by the statute is a *pecuniary* interest, and therefore an insurance by a father in his own name on the life of his son, he having no pecuniary interest in the continuance of it, is void.
- Reed v. Roy. Exch. Co.*, Peake Add. Ca. The time at which the required interest must exist is the time of the entering into the contract. It may have wholly ceased at the time of the death, but the insurance office will nevertheless be bound to pay the money, for, as already stated, life insurance is not a contract of indemnity.
- 33 & 34 Vict. c. 93, s. 10. The assignee of a life policy need not show any interest of his own in the life of the person insured. It is sufficient for his purpose that the required interest existed at the time the policy was effected. If the policy has not been regularly assigned, but the document has been simply handed over to a person, he has a right to retain it, altho' he cannot recover the money from the insurers. "This is one of those cases," said Cairns, C., in the case referred to, "in which the plaintiff may not be able to recover the document which is the evidence of the debt, while the person who holds that evidence may not be able to recover the debt itself; but with that we have nothing to do."
- Halford v. Kymer*, 10 B. & C. It is to be observed that, tho' life insurance is not a contract of indemnity merely, yet a man cannot recover more than the amount of his insurable interest at the time of the contract. He could not, for instance, insure with half-a-dozen different offices and recover the money from all of them. This is the effect of the construction placed by *Hebbon v. West* on sect. 3 of 14 Geo. III. c. 48.
- Ashley v. Ashley*, 3 Sim. A person insuring his life has usually to answer a number of questions as to the state of his health, &c., &c. If it is made a condition of the policy that these questions shall be answered truly, the policy will become void for immaterial or unintentional errors. The truth of the declarations is in that case the basis of the contract. If there is no such condition, the question is whether the concealment or misrepresentation is of a material fact.
- Rummens v. Hare*, 1 Ex. Div. It is very often made a condition that the policy shall become void
- Anderson v. Fitzgerald*, 4 H. L. C. London Assurance Co. v.

in the event of suicide. Such a condition covers suicide while in a state of insanity. A felonious suicide vitiates a policy independently of such a condition ; as also does an exit with the assistance of Her Majesty's hangman.

Mansel,
41 L. T.,
N. S.
Borrodaile
v. *Hunter*,
5 M. & G.;
and *Clift*
v. *Schwabe*,
3 C. B.
Amicable
Assurance
Society v.
Bolland,
4 Bligh.

Concealment from Marine Insurers.

CARTER v. BOEHM.

[81.]

[1 W. BL. & S. L. C.]

The governor of Fort Marlborough, in the island of Sumatra in the East Indies, came to the conclusion that there was considerable danger of his fort being captured. He wisely, therefore, wrote to his brother in England, and asked him to get the fort insured for a year. The brother accordingly went to Boehm and Co., and that eminent firm insured Fort Marlborough against capture by "a foreign enemy" between October 16th, 1759, and October 16th, 1760. In April, 1760, the fort was captured by the French, and this action was brought to recover the insurance money. The insurers declined to pay, on the ground that certain material facts contained in two letters which the governor had written to his brother in September, 1759, had been concealed from them. In those letters the governor spoke of the weakness of his fort, and the probability of the French attacking it. It appeared, however, that the fort was little more than a factory, being merely intended for defence against the natives, so that its weakness was an immaterial fact as regarded the French, while the probability of their attacking it was a question which a person in England was in a better position to determine than the governor himself, and on those grounds Boehm and Co. were ordered to pay up.

Stribley v.
Imperial
Marine
Insur. Co.,
1 Q. B. D.

On the principle that the minds of the contracting parties are not *ad idem*, the concealment of a material fact vitiates a policy of insurance. It does not in the least matter whether the concealment was intentional or accidental; the only question is whether it was of a *material* fact. Everything that can increase the risk insured must be communicated, and it makes no matter that the fact was once actually known to the underwriter if it was not present to his mind at the time of effecting the insurance. During the American war, fifteen years or so ago, there was a notorious confederate cruiser named the *Georgia*. While the war was still going on, this vessel became converted to the arts of peace, and was bought by a Liverpool ship-owner for a merchantman. Everyone who knew anything at all, and of course all the insurance offices in England, knew the history of the boat, and that the United States would only just like to meet her for five minutes on the high seas with her teeth drawn. Not long afterwards her new owner insured the *Georgia* with the defendants. He did not tell them that she was the once terrible cruiser, and they very stupidly had forgotten all about that vessel, and insured her as if she had been a peaceful respectable character all the days of her life. The *Georgia* then went to sea, and was almost immediately captured. In an action on the policy, it was held that the ship-owner ought to have disclosed the *Georgia's* history to the defendants, inasmuch as, tho' they had once known it, it was not present to their minds at the time of the contract.

Bates v.
Hewitt,
L. R.
2 Q. B.

But, on the other hand, the party effecting the policy is not bound to disclose mere rumours, even if they have appeared in the newspapers, nor such things as it is the business of the underwriters to find out for themselves, such as the dangers of particular seas and rivers, or the probabilities of hostilities. This was the point on which the leading case turned.

Cory v.
Patton,
L. R.
7 Q. B.

It may be mentioned that material facts which have come to the knowledge of the assured after the slip is initialed, but before the policy is completed, need not be communicated.

Whether any particular fact was material or not—that is to say, whether it ought to have been disclosed—is a question for the jury. The point cannot be said to be entirely free from doubt, but the probabilities are that on such an enquiry skilled witnesses, having no interest in the matter litigated, *can* be put into the box to say that, if they had been the underwriters, they would or would not have been materially influenced by this or that fact.

Berthon v.
Loughman,
2 Stark,
and *Rick-*
ards v.
Murdock,
10 B. & C.

*Partnership Liability.***WAUGH v. CARVER.**

[82.]

[2 H. BL. & S. L. C.]

In February, 1790, Erasmus Carver and William Carver, ship-agents, of Southampton, of the one part, and Archibald Giesler, ship-agent, of Plymouth, of the other part, entered into a rather wide-awake agreement for their mutual benefit. By the terms of this agreement Giesler was to remove from Plymouth and settle at Cowes. There he was to establish a house on his own account, which the Carvers were to puff. Giesler, on the other hand, was to endeavour to persuade all the ship-masters putting into Portsmouth to employ the Carvers. Arrangements were made for sharing in certain proportions the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them. It was also expressly provided that neither of the parties to the agreement should be answerable for the acts or losses of the other, but each for his own. Accordingly, Giesler left Plymouth and came to Cowes, and in the course of carrying on his business there he incurred a certain debt to the plaintiff in this action, who now sought to make the Carvers liable on the ground that the agreement made them partners with Giesler and responsible for his debts.

It was held, in spite of the clause providing that each should be responsible for his own losses, that the agreement did make the Carvers partners, for—

(1). He who takes the profits of a partnership must of necessity be made liable to the losses.

(The student, however, must look at the note before taking this proposition for gospel.)

(2). He who lends his name to a partnership becomes, as against all the rest of the world, a partner.

[83.]

COX v. HICKMAN.

[8 H. L. C.]

Messrs. Smith and Co., iron-merchants, becoming insolvent, a deed of arrangement was executed between them and their creditors. By this deed Smith and Co. assigned all their property to five trustees to carry on the business under the name of the Stanton Iron Company. The trustees were to manage the works as they thought fit, and to execute all contracts and instruments in carrying on the business. Amongst the creditors were two gentlemen who afterwards blossomed into the defendants in this action. They subscribed and executed the deed, and were both named as trustees. One of them never acted at all; the other acted for six weeks and then resigned. The other trustees, however, did act, and did the best they could for the business. In the carrying on of the business the plaintiff supplied the company with a quantity of iron-ore, and one of the trustees accepted bills of exchange in the name of the company for the price of it.

The question was whether the trustees were agents for the defendants to accept the bills, and it was held that they were *not*; on the ground that the persons for whose benefit the business was carried on were not the creditors, but Messrs. Smith and Co. The real test of partnership liability, the judges said, was *not* participation in the profits, but whether the trade was carried on by persons acting as the *agents* of the persons sought to be made liable.

Persons may be partners as regards the world at large, altho' they are not partners as between themselves ; they may have all the kicks without any of the halfpence. If a man holds himself out as a partner he is liable to a person who for that reason gives credit to the firm. If it were not so, there would be even more imposition in business transactions than there already is. The law does not prescribe any particular acts which shall constitute a "holding out : " evidence may be given of anything the defendant has done which would induce others to believe that he was a partner, such acts having the effect of an estoppel by conduct.

As to the other point of these cases, it was for a long time thought that if it could be proved that the defendant *shared the profits* he was thereby proved to be a partner. The effect of the case of *Cox v. Hickman* is to destroy this doctrine ; and the law now is that, tho' community in the profits is *strong* evidence of partnership, it is not *conclusive* evidence. There must always be an examination into the *intention* of the contracting parties. It is also provided by an Act passed in 1865, and called Bovill's Act, that the following agreements 28 & 29 shall not of *themselves* be sufficient to make the contracting parties *Vict. c. 86.* partners :—

1. When by contract in writing a person lends money to a trader on the terms that the lender shall receive interest varying according to the success of the concern.

The Act, however, expressly provides that, if the trader comes to financial smash, the unfortunate lender is not to be repaid a penny of his money till all the regular creditors have been satisfied.

2. Wide-awake employers with a view to stimulating energy and industry often agree with their clerks and servants that the latter shall be remunerated by a share of the profits. Such an agreement does not constitute a partnership between master and man.

3. The child or widow of a deceased partner is not to be deemed a partner merely for receiving an annuity arising out of the profits of the business.

4. When a successful tradesman sells the goodwill, and retires into the obscurity of private life, he may agree with the vendee to be paid by an annuity out of the profits, without such agreement making him a partner.

It must be observed, however, that the principle of *Cox v. Hickman* (which is of earlier date than the statute) would have applied to all these four cases ; so that there was no particular necessity for any Act of Parliament on the subject. The only effect, it has been said, of the Act is to make the state of the law to be that participation in the profits, while it is *always insufficient evidence* to establish partnership liability, is as to the protected classes *no evidence at all.*

Per Kelly,
C.B., in
Holme v.
Hammond,
L. R. 7 Ex.

It may be convenient here to notice that when a person who has

held himself out as a partner retires from the firm he of course continues liable on contracts made *before* his retirement. As to contracts made by the firm *after* his retirement, the rule is this:—If the retiring partner has advertised his retirement in the *Gazette*, he is not liable to persons who did not deal with the firm when he was a member of it. But to prevent his being held liable to persons who *did* deal with the firm when he was a member of it, advertisement in the *Gazette* is not sufficient, such persons, unless aware of the retirement, being entitled to express notice. Dormant and secret partners are different in this respect from those who hold themselves out. Nobody trusted them, nobody knew anything about them; and so they do not continue liable after leaving the firm.

Farrar v.
Deplinne,
1 C. & K.

On the power of one partner to bind the others the leading case 2 B. & Ald. (usually so considered) is *Sandilands v. Marsh*, where it was held that a navy agent, who does not usually deal in annuities, bound his firm by guaranteeing the payment of an annuity which he had purchased for a customer. The rule, however, is, that one partner only has power to bind the others to those contracts which have to do with the joint trade. To take a familiar illustration: a member of a mercantile firm would generally bind his firm by accepting a bill of exchange, but a member of a firm of solicitors would not so bind his. In the recent case of *Yorkshire Banking Co. v. Beatson*, which is of some importance on this subject, it was held that “if the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm.” As the court in that case pointed out, the law of partnership is really a branch of the law of agency.

Hedley v.
Bain-
bridge,
3 Q. B.
4 C. P. D.;
and see
Hogarth v.
Latham,
3 Q. B. D.

Contract of Sale.

[84.]

TARLING v. BAXTER.

[6 B. & C.]

On January 4th, 1825, it was in writing agreed between Mr. Baxter and Mr. Tarling that the former should sell to the latter a stack of hay then standing in Canonbury Field, Islington (hay-stacks at Islington!), at the price of

£145. Payment was to be made on February 4th, but the stack was to be allowed to remain where it was till May Day. It was not to be cut till paid for. This was held to be an immediate not a prospective sale, so that when on January 20th the stack was accidentally burnt down, the loss fell on Tarling the buyer. "The rule of law," said Bayley, J., "is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that, if it be destroyed, the loss falls on the vendee."

ACRAMAN *v.* MORRICE.

[85.]

[8 C. B.]

Morrice, a timber-merchant, agreed to buy from one Swift the trunks of certain oak-trees belonging to Swift and lying at his premises at Hadnock, in Monmouthshire. He marked out the timber he wanted and paid for it, and it only remained for Swift to *sever the parts not wanted* and send off the rest to the purchaser. Unfortunately just then Swift became bankrupt. On hearing of his bankruptcy Morrice rose to the occasion. He sent his men to Hadnock, and had all the timber he had paid for carried off. Swift's assignees, however, of whom Mr. Acreman was the leading spirit, objected to this proceeding, as they considered that the property in the timber had not passed to Morrice, Swift not having severed the boughs. This contention prevailed, Wilde, C.J., saying—"Upon a contract for the sale of goods, so long as anything remains to be done to them by the seller, the property does not pass, and the seller has a right to retain them. In the present case several things remained to be done. The buyer, having selected and marked the particular parts of the trees which he wished

to purchase, it became the seller's duty to sever those parts from the rest, and to convey them to Chepstow, and there deliver them at the purchaser's wharf. . . . The property clearly had not passed to the defendant, and he was guilty of a trespass and a conversion in possessing himself of it in the way he did."

When the subject-matter of a sale is clear and ascertained at the time of the contract, and the price is fixed, the property in the thing sold, with all the risks, passes at once to the purchaser. To this rule, which *Turling v. Baxter* illustrates, *Acraman v. Morrice* supplies us with an exception, viz., that when something remains to be done by the seller the property does *not* pass. The property in a chattel may be in the vendee so as to make the loss fall on him if the thing were to perish, and yet he may not be entitled to the possession. In a ready-money sale the vendor has a lien for the price. But when goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him.

When goods, part of an entire bulk, are sold, the property in such goods does not pass till they are separated from the bulk. The seller must appropriate the particular part sold, and the buyer must assent to the appropriation.

Dixon v. Yates,
5 B. & Ad.

When the sale is of a chattel to be made by the seller, the rule is that the property does not pass till the chattel is actually made and delivered to the buyer; so that the seller may give a good title with it to a third party. A Mr. Pocock once ordered a boat-builder to build him a barge. The boat-builder set about it; he was paid money on account as the work proceeded, and by and by the name of Mr. Pocock duly appeared painted on the stern. In spite of all this, it was held that the property in the barge had not passed, and, the boat-builder having foundered in the sea of bankruptcy, that it belonged to his assignees. Another strong case the same way is

Mucklow v. Mangles,
1 Taunt.
8 B. & C.

Atkinson v. Bell, where some Whitehaven thread manufacturers refused to accept some spinning machines they had ordered the plaintiff to make for them. But any circumstances showing a distinct intention to pass the property will be laid hold of by the courts as evidence of appropriation. Thus, if a ship-builder employed to make a ship signs the certificate enabling the other party to have the ship registered in his name, it is sufficient.

Woods v. Russell,
5 B. & Ald.

Hinde v. Whitehouse,
7 East.

It may be mentioned that on a sale by auction the property in the goods sold passes, altho' they are not to be delivered till certain dues are paid.

Stoppage in Transitu.

LICKBARROW v. MASON.

[86.]

[2 T. R. & S. L. C.]

The originator of this litigation was one Freeman, of Rotterdam, who had the audacity to become bankrupt and confound the transactions of a great many honest people. The *dramatis personæ* are somewhat numerous, but the student will probably find the following account reasonably clear and correct.

Freeman sent an order to Messrs. Turings, of Middleburg, to ship a quantity of corn to Liverpool. This order Messrs. Turings were rash enough to execute; for they then considered Freeman to be, if not "the richest merchant in Rotterdam," at all events, a safe and solvent person. On July 22nd, 1786 (the year will be remembered as the date of a famous impeachment), Messrs. Turings put the corn on board the ship *Endeavour*, whereof the master was a Mr. Holmes. It is the duty of a master when he sets out on a voyage like this to sign bills of lading, by way of acknowledging that he has got the goods on board. Holmes signed four of these bills of lading (usually, it may be remarked, only three are signed); and of the four one he pocketed, two were indorsed in blank by Turings and Co. and sent to Freeman with an invoice of the goods shipped, and the fourth was retained by Messrs. Turings.

The sound ship *Endeavour* had not set sail very long when tidings came to the ears of the Turings that Freeman had become bankrupt. Rising to the occasion, they immediately sent off the bill of lading that remained in their custody to Messrs. Mason and Co., of Liverpool, with a special indorsement to deliver the corn to them for Messrs. Turings' benefit. Pursuant to this special indorsement,

Mr. Holmes, when he arrived at Liverpool, delivered his cargo to the Masons. In the meantime, however, and before he became bankrupt, Freeman had sent his two bills of lading to Messrs. Lickbarrow duly negotiated for a valuable consideration. Messrs. Lickbarrow, therefore, were anything but pleased to find that Mason and Co. had got hold of the corn, and they brought this action to try and make them give it up. In this they were successful. Judgment was given for the plaintiffs, on the ground that a *bond fide* assignment of the bills of lading defeats the vendor's right to stop *in transitu*.

When a man becomes bankrupt his goods are divided amongst his creditors, nobody getting the full amount that is due to him, but everybody getting a proportion of it. Thus, the person who has most recently been rash enough to entrust the trader with goods on credit is the most to be pitied, for what was yesterday all his own is to-day part of the general fund from which each creditor derives the proportion of his debt. It is to prevent in certain cases this injustice of one man's goods being used to pay another man's debts that the doctrine of *stoppage in transitu* is introduced.

The effect of that doctrine is this : tho' the vendor has sent off his goods, and parted with the property in them, to the vendee on a credit sale, he may, nevertheless, on hearing of that gentleman's bankruptcy or general inability to pay his debts, stop the goods and retake possession of them at any time while they are on their journey to him, and have not come into his actual possession. The right to stop is personal to the vendor or consignor. It cannot, for example, be exercised by a surety for the price of the goods. But the vendor may, at any time before the *transitus* has ended, ratify the Act of a stranger who stops the goods. The great question in most *stoppage in transitu* cases is, was the journey at an end or not? The goods are *on the journey* as long as they are in the hands of the carrier *as such* ; but the carrier may hold them as bailee for the vendee, as when the latter pays him a rent for warehousing them. Fine points often arise in those cases in which the buyer has provided the ship as to whether or not the *transitus* is at an end. About a couple of years ago a China clay company agreed to sell a Mr. Cock, of St. Austell, a quantity of China clay. Mr. Cock chartered a ship and sent it to the port of loading, and the company put the clay on board. But, Cock committing an act of bankruptcy, it was held that their right to stop was not gone, inasmuch as the clay was in possession of the

Siffken v.
Wray,
6 East.
Bird v.
Brown,
4 Exch.

master of the ship, not as the purchaser's agent, but as carrier. It was also held that it makes no difference that the ultimate destination of the goods has not been communicated by the purchaser to the vendor. Tho' once a doubtful point, it is now clear that the vendee may anticipate the termination of the journey, and so defeat the right of stoppage by going out to meet the goods. On the other hand, the carrier may not prolong the transit so as to give the vendor an increased right of stoppage. To stop the goods it is not necessary that the vendor should lay corporeal touch upon them. It is sufficient if he gives notice to the carrier; tho' he should take care to give the notice to those who have the *immediate* custody of the goods; or, if to their employers, so that they may have reasonable time to communicate with such persons.

The stopping of *part* of the goods consigned has no effect on the remainder. On the other hand, the delivery of a part of goods sold under one entire contract, if such delivery of part was intended to represent the whole (but only if so), will defeat the right to stop *in transitu*. The most usual way, however, in which the vendor's right is defeated is by assignment of the bill of lading. Generally a vendee cannot stand in a better position than his vendor; but it is the second rule of *Lickbarrow v. Mason* that if, while the goods are *in transitu*, the vendee indorses the bill of lading (as Freeman did) to a person who takes it in the ordinary way of business (not being for an antecedent debt) and in perfect good faith, the vendor's right to stop is at an end. He shall suffer (for it is a maxim of law that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it) rather than the innocent indorsee who has given a valuable consideration and behaved with unimpeachable honesty. It is to be remarked, however, that an indorsee is equally bound with the vendee himself by any condition to which the bill of lading may be subject, as, for instance, if it be indorsed with the condition that the goods are only to be delivered, "provided E. B. pay a certain draft."

The point cannot be said to be quite settled, but much the better opinion is that the effect of stoppage *in transitu* is not to rescind the contract, but simply to give the vendor a lien on the goods. Thus, the assignees of the bankrupt purchaser can call upon the vendor to deliver up the goods on payment of the price.

Ex parte Rosevear China Clay Co.; Re Cock, 40 L. T., N. S. *Mills v. Ball*, 2 B. & P.

Whitchhead v. Anderson, 9 M. & W.

Stubey v. Heyward, 2 H. Bl., and *Ex parte Cooper In re McLaren*, L. R. Ch., June, 1879.

Barrow v. Coles, 3 Camp.

See *Clay v. Harrison*, 10 B. & C., and *Wentworth v. Outhwaite*, 10 M. & W.

Contract to Marry.

[87.]

ATCHINSON v. BAKER.

[PEAKE ADD. CA.]

Mrs. Baker was a rich widow ; fair, fat, forty, and in every way calculated to crown the felicity of a man of moderate tastes. She yielded to the persuasions of Mr. Atchinson, a widower of the same age, and promised to marry him. At the time of the promise Mr. Atchinson had all the appearance of being, and no doubt was a sound, healthy, capable man, and the widow congratulated herself on her approaching nuptial bliss. But before the happy day came she was disgusted to find—so she said—that her lover had an abscess on his breast ; and immediately the fever left her. She vowed she would never link herself to a putrid mass of corrupting humanity. Mr. Atchinson brought an action for breach of promise, and the trial elicited some valuable remarks from Lord Kenyon : “ If the condition of the parties is changed after the time of making the contract it is a good cause for either party to break off the connection. Lord Mansfield has held that if, after a man has made a contract of marriage, the woman’s character turns out to be different from what he had reason to think it was, he may refuse to marry her without being liable to an action, and whether the infirmity is bodily or mental, the reason is the same ; it would be most mischievous to compel parties to marry who can never live happily together.”

Promises to marry, as they are generally made in haste, so they are very often repented of at leisure. It is therefore a very important subject of inquiry—what circumstances will justify me in repudiating my promise, and jilting my young woman ? Lord Kenyon’s remarks obviously go very far indeed. A happy marriage is his aim, and any

change in the condition of the parties is sufficient to sweep away the promise, and make the person who gave it a free man (or free woman) once more. Unfortunately, however, there is a certain case of *Hall v. Wright* which is subsequent to *Atchinson v. Baker*, and not altogether reconcilable with it. In that case a gentleman being sued on a promise to marry pleaded that since his promise he had become afflicted with a dangerous bodily disease, which had occasioned frequent and severe bleeding from the lungs, and, in short, that he was a totally different man from what he was when he promised. "*Non sum qualis eram*" was his piteous refrain. But it was held by the Exchequer Chamber (not without considerable division of opinion) that such a plea was no answer to the action. They said he had promised absolutely when, if he had liked, he might have promised conditionally; that his illness did not make it impossible to perform his undertaking but only inadvisable; and that it did not lie in a man's mouth to set up his own unfitness for marriage, for it might have arisen from his own follies and vices; it was an argument for the woman if she wished to get out of her promise, but she might wish to marry an incurable invalid for the sake of the social position she would gain as his wife and widow. On the other side it was urged that the continuance of such a state of health as made it not improper to marry was an implied condition of the defendant's promise: for that where the performance of a contract depends on life or health, it always is an implied condition that the contractor shall remain alive and well enough for the purposes of the contract. The dignity and sacredness of marriage, too, was made something of: "I think," said Pollock, C.B., "if the man can say with truth, 'By the visitation of Providence I am not capable of marriage,' he cannot be called upon to marry; and I think this is an implied condition in all agreements to marry. I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

On this point see *Boast v. Firth*, L. R. 4 C. P.; *Robinson v. Davison*, L. R. 6 Ex., and *Pousard v. Spiers*, 1 Q. B. D.

But tho' (according to *Hall v. Wright*) a defendant cannot get out of his promise by disparaging himself, he can sometimes by disparaging the plaintiff. If, for example, after he has given his promise he discovers that the other party is a person of gross immorality, or, if the promise was induced by material misrepresentations as to the plaintiff's family or position, he has a good defence. The gentleman, too, can always plead that the lady is a prostitute, or the lady that the gentleman is impotent. And it would be a good defence for the woman to show that the plaintiff was a person of a violent temper, and had threatened to ill-use her.

It is scarcely necessary to say (but the student should be put on his guard against designing females) that a promise to marry need not be

evidenced by writing, it having been expressly decided that such a promise does not come within the range of sect. 4 of the Statute of Frauds. It has, however, been provided by the Legislature that "no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Not long ago a woman overheard a conversation between her sister and a man, in the course of which the sister exclaimed, "You always promised to marry me, but you never keep your word!" Instead of indignantly denying that he had ever made such a promise, the man *remained silent*, and it was held that this was "material evidence in support" of the promise of marriage within the statute.

Harrison v. Cuge,
Ld. Raym.

32 & 33
Vict. c. 68,
s. 2.

Bessela v. Stern,
46 L. J.

Attempts are from time to time made—perhaps not very seriously—to abolish the action for breach of promise altogether.

Recovery of Money Paid under Mistake, &c.

[88.]

MARRIOTT v. HAMPTON.

[7 T. R. & S. L. C.]

This case should impress the student with the wisdom of taking care of the receipt on those rare occasions when he pays his tailor's bill. Hampton, possibly, was not a tailor, but he was no doubt a tradesmen of some sort, and in the course of his trade sold goods to Marriott. These Marriott duly paid for and obtained a receipt. But, instead of carefully putting it where he could find it if he wanted it he put it where he could not find it. By and by Hampton,—relying, it may be, on his knowledge of Marriott's careless gentlemanly habits,—sent in his bill again with the air of a long-suffering and ill-used creditor. Marriott had a distinct recollection of having paid for the trousers, and said so. Hampton, however, challenged him to show paper, and tho' Marriott looked high and low for the document, it could not be found, and, as Hampton brought an action, he was obliged to pay over again.

But it came to pass that after a while the missing receipt turned up, and Marriott carried it in triumph to Hampton's shop. "Yes," said that respectable tradesman, "it seems right enough, I own; but excuse me if I say that—well, I have got the money, and I intend to stick to it." Marriott now went to law to force him to repay the money, but the student will be grieved to hear that his efforts were not crowned with the success he deserved. Lawyers must live, of course; but *interest reipublicæ ut sit finis litium*, and there would be no end to fat contentions and flowing fees if everybody could have their cases tried over again when fresh evidence came to light.

If I pay money under a mistaken impression that a certain state of facts exists, I can (unless he has a claim in conscience to retain it) recover it from the person to whom I have paid it as money paid without consideration. *Ignorantia facti excusat*. Two persons agreed to dissolve partnership, and one of them paid to the other a sum of money for his share, on the footing of an investigation of the partnership accounts he had made. He afterwards discovered that the profits were not so great as he had supposed them to be, so that he had paid too much for the share. This being a mistake of fact, it was held that, in spite of his carelessness in not having sufficiently looked into the matter, he could recover the sum paid in excess. In another well known case the plaintiff, a Derbyshire attorney, had been employed by the defendant, a London attorney (it is edifying this spectacle of diamond cutting diamond), to collect some rents for him near Matlock. £150 was collected, and the plaintiff sent him a bill, which was in reality an Irish bill, tho' it had all the appearance of being, and both plaintiff and defendant believed it to be, an English one. When this bill was presented by the defendant it was dishonoured; and the defendant ought then to have given the usual notices of dishonour. But he did not do so, and a month later he wrote to the plaintiff asking him to send the £150 rent, and saying that the bill was no good, as it only had a four shilling stamp on it. On examining the bill, the plaintiff found that this was so, and accordingly sent the £150. But, not long afterwards, he discovered that the bill had been drawn and indorsed in Ireland, and bore the proper stamp for that country; and so he brought an action against the London attorney to recover back the money. It was held that he was entitled to do so, as he had paid

Townsend
v. Crowdy,
8 C. B.,
N. S.

Milnes v. Duncan,
6 B. & C.

the money under a mistake of the real facts. So, too, if money is paid under a "blind suspicion" of the facts or in the hurry of business, it can be got back.

Lucas v. Worswick,
1 M. & Rob.

But if I pay money with full knowledge of the facts, but mistaking the law, or, like Mr. Marriott, by compulsion of legal proceedings, I cannot (if it can be conscientiously retained) recover it. *Ignorantia juris non excusat*. A ship captain brought home in his

Rogers v. Ingham,
3 Ch. Div.

ship a quantity of treasure, and when he got to England paid over a certain portion of it to the admiral under whose convoy he had sailed, not at all in a spirit of gratitude, but believing that he was bound by law to pay it. By and by he discovered that the law did not really compel him to pay it, and he brought an action to get it back. But it was held that he could not get it back, for his

Brisbane v. Dacres,
5 Taunt.

mistake had been of the law and not of the facts. In another case often referred to, an underwriter had paid £100 upon a policy of insurance as for a loss. He now tried to get it back, saying he had paid it under a mistake, the defendants not having disclosed a material letter, the legal effect of which he did not understand. It turned out to be clear that all the documents had been laid before the underwriter, and his misapprehension of the law was held to be no reason why he should get the money back. "Every man," said Lord Ellenborough, "must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."

Billie v. Lumley,
2 East.

It is to be observed that, to make money paid under compulsion of legal proceedings irrecoverable, the proceedings must be regular, and not a mere cloak for extortion. A person named Collins, who was quite insolvent, had the impudence to arrest a continental duke for an imaginary debt of £10,000. His excellency was frightened—perhaps he had heard that debtors in England were ordered off to instant execution—and paid £500 for his release. He afterwards brought an action to recover back this money, and was held entitled

Cadaval v. Collins,
4 A. & E.

to do so. Of course, in such a case as this the money could not be "conscientiously retained" by the person to whom it was paid.

Suing Before the Day of Performance.

[89.]

HOCHSTER v. DE LA TOUR.

[2 E. & B.]

Mr. de la Tour, meditating a tour on the Continent,

engaged Hochster as his courier at £10 a month, the service to commence on June 1st. Before that day came, however, Mr. de la Tour altered his mind, and told Hochster he should not want him. Without wasting words or letting the grass grow under his feet, and before June 1st, Hochster issued his writ in an action for breach of contract. For De la Tour it was argued that Hochster should have waited till June 1st before bringing his action, for that the contract could not be considered to be broken till then. It was held, however, that the contract had been sufficiently broken by De la Tour's saying definitely that he renounced the agreement.

Generally speaking, no action for the breach of an executory contract can be brought till the day of performance arrives. But if one of the parties puts it out of his power to perform it, or expressly renounces the contract, the day of performance need not be waited for. If a young lady agrees to marry me on May 10th, and, in defiance of such agreement, marries Jones on April 1st, I may bring an action against her as soon as I like after April 1st, altho' it is quite possible that before May 10th comes she may be a blooming widow and quite at my service. Similarly, if a man agrees to sell goods to me on a future day, and before that day sells them to somebody else, I may sue him at once.

Short v. Stone,
8 Q. B.

So, too, of an express renunciation. A few years ago a man promised his sweetheart that, tho' he could not marry her immediately, he would do so the moment his father died. Soon afterwards he repented of his promise, and, in the lifetime of his father, told the lady frankly that he retracted his promise, and would never marry her. Being a strong-minded lady she instantly went to law, and the judges, following *Hochster v. De la Tour*, decided that she might regard the contract as broken immediately on the defendant's renouncing it. The renunciation, to rescind a contract, must be precise and clear. In *Avery v. Bowden* (where the defendant was sued for not having loaded a cargo on board the plaintiff's ship) the court said, "According to our decision in *Hochster v. De la Tour* (to which we adhere), if the defendant within the running days, and before the declaration of war, had positively informed the captain that no cargo had been provided, or would be provided, for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract, and thereupon, sailing away from Odessa, he might have loaded a

Frost v. Knight,
L. R. 7 Ex.
5 E. & B.

cargo at a friendly port from another person ; whereupon the plaintiff would have had a right to maintain an action on the charter-party to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract."

It may be remarked that a promise to marry, without any particular time being specified, is a promise to marry within a reasonable time after request.

Discharge of Servants.

[90.]

TURNER v. MASON.

[14 M. & W.]

Turner was a housemaid in the service of the defendant, Mason. Her mother became ill and likely to die, and Turner asked her master's permission to go and see her. This, whether afraid of infection, or for what reason we know not, Mason refused ; and so the girl took French leave and went. For this disobedience Mason dismissed her, and she now brought an action for wrongful dismissal, urging that it was a moral duty to go and visit a dying mother. Judgment, however, was given for the defendant, on the ground that the girl had been guilty of wilful disobedience, for which her master had a right to dismiss her.

In addition to the case of wilful disobedience, a servant may be discharged without wages or notice—

1. When he has been guilty of gross moral misconduct.
2. When he does not give proper attention to his master's business.
3. When he is incompetent for his work ; or
4. When he sets up a claim to be a partner.

Amor v.
Fearon,
9 Ad. & E.

Altho' the master may not have assigned any one of these reasons at the time of the dismissal, and may not even have known that such

reason existed, he is not thereby precluded from relying on one of them when the servant brings his action for wrongful dismissal.

Tho' in the above cases the servant forfeits his right to wages for the current period, he does not forfeit his right to wages already accrued due. If a man, for instance, is engaged at a salary of £50 a month, there is a vested right which cannot be affected by subsequent misconduct to the £50 at the end of each month.

Ridgway v. Hungerford Market Co.,
3 A. & E.

A word may be said as to the notice which servants are entitled to. If the hiring is a general one, it is presumed to be for a year, and the servant cannot be dismissed till the year has expired. Special circumstances, however, may rebut this presumption, and, if the wages are payable weekly, it may be found a weekly hiring, and a week's notice is sufficient. And even in cases to which the presumption naturally applies, custom may entitle the master to discharge before the end of the year. A clerk, for instance, tho' hired generally, can be discharged with three months' notice, and a menial servant (governesses not included in this term) with one.

Button v. Thomson,
L. R.
4 C. P.

It is to be observed that a servant wrongfully dismissed is not to receive as a matter of course his full wages for the unexpired term. The amount is to be cut down by his chances of getting other employment, and he ought to do his best to get such other employment.

Evans v. Roe, L. R.
7 C. P.

Todd v. Kerrich,
8 Ex.

Hartland v. Gen. Exch.
Bank, 14
L. T., N. S.

Bills of Sale, &c.

TWYNE'S CASE.

[91.]

[3 REP. & S. L. C.]

A Hampshire farmer named Pierce got deeply into debt; and amongst his creditors were two persons named Twyne and Grasper; to the former he owed £400, and to the latter £200. After repeatedly dunning the farmer in vain, Grasper decided to go to law for his money, and had a writ issued. As soon as Pierce heard of this, he took the other creditor, Twyne, into his confidence, and in satisfaction of the debt of £400 made a secret conveyance to him of everything he had. In spite of this deed, however,—in pursuance of the nefarious arrangement

between them,—Pierce continued in possession just as if he had never made it. He sold some of the goods, sheared and marked some of the sheep, and in every way acted as if he were the monarch of all he surveyed and Twyne had nothing to do with it. Meanwhile Grasper went on quietly with his action, got judgment, and consequently the assistance of the sheriff of Southampton, who appeared one day at the homestead with the intention of carrying off in Mr. Grasper's interest whatever he might chance to find there. This proceeding Twyne, who suddenly appeared on the scene, strongly objected to, for, said he,—“everything on this farm belongs to *me*, not to Pierce,” and, in proof of his assertion, he produced the deed of conveyance.

The question was whether this deed of conveyance was void within the meaning of an Act of Parliament passed in Queen Elizabeth's reign, which provides that all gifts made for the purpose of cheating creditors shall be void. And, for the following reasons, this gift of Pierce's was considered to be just the kind of gift contemplated by the statute :—

(1). It was impossible that anybody could really be so generous as Mr. Pierce had proposed to be. He had given away everything he had in the world, even down to the boots he was wearing. Such self-denial could only be the cloak of fraud.

(2). In spite of his parade of liberality, Mr. Pierce did not let one of the things go, but used them all just as if they were his own, thereby obtaining a factitious credit in the world.

(3). Then, if there was no fraud, why was there so much mystery about it? Why wasn't the gift made openly?

(4). The gift was made, too, when Grasper had already commenced an action, and evidently meant business.

(5). There was a trust between the parties, and trust was only another name for fraud.

(This reminds one of the little boy who was asked what trade he would like to be brought up to. "Oh," said the bright little man promptly, "the trustee trade, 'cause ever since pa's been a trustee we've 'ad puddin' for dinner.")

(6). The deed alleged that the gift was made "honestly, truly and *bonâ fide*," and that was a very suspicious circumstance in itself.

It is provided by 13 Eliz. c. 5 that all gifts and conveyances, whether of lands or chattels, made for the purpose of delaying or defrauding creditors shall be void as against such creditors unless made upon a valuable consideration and *bonâ fide* to some person not having notice of the fraud. Now, it is clear that farmer Pierce's gift was for valuable consideration. Why then was it void? The answer is, because it was not *bonâ fide*. It was merely the creation of a trust for the benefit of the honest man himself.

It has recently been decided that a deed by an insolvent conveying his estate to trustees, and containing a clause to the effect that only those creditors shall receive a dividend who within a certain time shall assent to a particular scheme beneficial to the debtor, is fraudulent and void within the statute of Elizabeth.

The present subject derives its chief interest and importance from bills of sale. It is sufficient here to say that a bill of sale is an instrument by which one man purports to grant to another his interest in the goods and chattels specified in such instrument. A bill of sale may be either *absolute* or *conditional*. When it is *absolute*, the grantor ought not generally to remain in possession, as, if he were to become bankrupt, the goods would vest in the grantor's trustee, which the grantee would not like. But if it has been, and continues to be, duly registered, it is no matter whether the grantor continues in possession or not; it is then valid even against the trustee. When the bill of sale is *conditional*, no transfer of possession is required, such a bill being to all intents and purposes a mortgage of personalty. For further information about bills of sale the student should refer to the Act of 1878, and to the treatises of Mr. Slade Butler and Mr. D. B. Wilson on the subject. The object of the Act of 1878 is, as Mr. Slade Butler says, "to give by means of registration information to all persons whom it may concern that a debtor, or a person about to contract debts, has executed a bill of sale, and thereby deprived himself of a portion of his property." The registration is to be within seven days, instead of twenty-one, as formerly; the necessity of attestation is introduced; the consideration must be stated in the bill; and other changes in the law of bills of sale have been made. It is not to be supposed, however, that an

Spencer v. Slater,
4 Q. B. D.

Sect. 20 of
the Act of
1878.
41 & 42
Vict. c. 31.

Sect. 8 of
the Act of
1878.

unregistered bill of sale is of no use whatever. It is good against the grantor himself, against his assigns, against strangers, and even against a creditor with whose knowledge and assent it was given.

It may, perhaps, be convenient here to mention the existence of 27 Eliz. c. 4. That statute is confined exclusively to real property, and provides that all voluntary conveyances of land shall be void against subsequent purchasers for value, whether with or without notice.

Suing on Quantum Meruit.

[92.]

CUTTER v. POWELL.

[6 T. R. & S. L. C.]

The defendant had a ship which was about to sail from Jamaica to England, and wanted a second mate. In answer to an advertisement a suitable person presented himself in the shape of Mr. T. Cutter, and the defendant gave him a note to this effect:—

“Ten days after the ship, *Governor Parry*, myself master, arrives at Liverpool I promise to pay to Mr. T. Cutter the sum of 30 guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool.”

The ship set sail on July 31st, and arrived at Liverpool on October 11th. But life is very uncertain; and on the voyage Mr. T. Cutter exchanged the billows of time for the haven of eternity. He had gone on board on July 31st, and had performed his duty faithfully and well up to the time of his death, which occurred on September 20th,—that is to say, when more than two thirds of the passage were accomplished.

If on these facts the unsophisticated but thoughtful student were asked whether Mr. T. Cutter's family would

be entitled to see anything of the 30 guineas, the probabilities are that he would reply—"Certainly; they might not be able to get the whole 30 guineas, but I suppose they would get something for the man's service from July 31st to the time of his death." In this opinion the unsophisticated but thoughtful student would be wrong.

"In this case," said one of the judges, "the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage, and the latter was to be entitled either to 30 guineas or nothing; for such was the agreement between the parties."

And so the widow went weeping away.

An entire contract cannot be apportioned. An ironmonger once agreed to make some dilapidated chandeliers "complete" for £10. He set to work on them, and certainly very much improved them. But he did *not* make them "complete," and therefore he did not succeed in recovering a farthing, altho' it was quite clear that the work he had done was worth £5 at least. But if the contract is not entire, but divisible, it is different. A ship which had suffered many things of many waves put into port to be doctored; and a certain shipwright agreed to put her into "thorough repair;" but nothing was said about the amount or mode of payment. The shipwright began the job, but after a while getting distrustful of his employers, he declined to go on unless he was paid for what had already been done. He was successful in his demand, the court distinguishing the case from the one above on the ground that the contract there was to do a specific work *for a specific sum*, whereas here there was nothing amounting to a contract to do the whole repairs and make no demand till they were completed.

Sinclair
v. Bowles,
9 B. & C.

Generally speaking, when the contract is entire, there are only two cases in which the plaintiff can demand payment on a *quantum meruit* without having wholly performed his part of the contract.

Roberts v.
Havelock,
3 B. & Ad

1. Where the defendant has absolutely refused to perform, or has incapacitated himself from performing his part of the contract.

In such a case it is not the plaintiff's fault that he has not performed his part of the contract, and it would be obviously unjust that he should suffer by the faithlessness of the person he contracted with. A literary gentleman once undertook to write a treatise on Ancient Armour for the "Juvenile Library." But the "Juvenile Library" proved so little successful that its promoters determined to

abandon it, whereby the literary gentleman, who had taken several journeys to inspect specimens of the rather ponderous raiment our ancestors were pleased to wear, and had written several chapters of his proposed work, was damaged to the extent of £50. It was held that, as the special contract was at an end, the writer on armour might sue on a *quantum meruit*.

Planché v.
Colburn,
8 Bing.

2. Where work has been done under a special contract tho' not in strict accordance with its terms, and the defendant has derived a benefit from it under such circumstances as to raise an implied promise to pay for it.

In this case, however, the employer may refuse to accept the work done; it is only when he does accept it and take the benefit of it that he may be sued on a *quantum meruit*. If, for instance, I agree with a man that he shall sell me a certain quantity of goods, and he only delivers part, I may send it back and have nothing more to do with him; but if I accept that part, I must pay for it.

In building contracts there is often a deviation from the original plan by consent of the parties. The rule as to the workman's payment for the extras so entailed is that the original contract is to be followed so far as it can be traced, but if it has been totally abandoned, then the workman may charge for his work according to its value as if the original contract had never been made.

Pepper v.
Burland,
Peake.

Assignment of Choses in Action.

[93.]

BRICE v. BANNISTER.

[3 Q. B. D.]

Mr. Gough, ship-builder, agreed to build a ship for Mr. Bannister, ship-owner, for £1375. After this agreement had been entered into, Mr. Gough gave one of his creditors, Mr. Brice, solicitor of Bridgwater, the following order, addressed to Mr. Bannister:—

“I do hereby order, authorise, and request you to pay to Mr. William Brice, solicitor, Bridgwater, the sum of £100 out of money due or to become due from you to me, and his receipt for same shall be a good discharge.”

Directly Brice received this order, he gave notice of it to Bannister in the following terms:—

“I hereby give you notice that, by a memorandum in writing dated the 27th of October, 1876, John Gough, of this place, authorized and requested you to pay me the sum of £100 out of money due or to become due from you to him, and my receipt for the same shall be a good discharge.”

Bannister seems to have thought that, as he had had nothing to do with this arrangement between Gough and Brice, it did not in any way concern him, and, in spite of the notice, paid the whole of the money for the ship to Gough.

This was an action by Brice, and it was held that the instrument in writing constituted a valid assignment of the £100. “It does seem to me,” said Bramwell, L.J., “a strange thing, and hard on a man, that he should enter into a contract with another and then find that, because that other has entered into a contract with a third, he, the first man, is unable to do that which it is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon.”

At common law a chose in action could not be assigned; but it is provided by the Judicature Act that “*any absolute assignment by writing under the hand of the assignor* (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, *shall be*, and be deemed to have been, *effectual in law* (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) *to pass and transfer the legal right* to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.”

36 & 37
Vict. c. 66,
s. 25,
sub-s. 6.

Brice v. Bannister was followed almost immediately afterwards in *Buck v. Robson*, where, however, the point requiring to be decided 3 Q. B. D. referred to stamp duty.

*Acknowledgments Saving the Statute of
Limitations.*

[94.]

TANNER *v.* SMART.

[6 B & C.]

21 Jac. I.
c. 16.

In 1816 Smart gave Tanner his promissory note for £160. In 1819 Tanner showed it him, and delicately suggested a settlement. Smart said frankly, "*I can't pay the debt at present, but I will pay it as soon as I can.*" Five years slipped by, and Tanner brought an action on the note, to which Smart pleaded *actio non accrevit infra sex annos*,—in other words, pleaded the Statute of Limitations. In reply to that defence, to show that the action *had accrevited* within the last six years, Tanner proved that only five years had elapsed since Smart had spoken the aforesaid words. This was, however, considered to be insufficient, in the absence of proof of the defendant's ability to pay, and the debtor scored smartly off his creditor.

Whether particular words amount to such an acknowledgment as to take a debt out of the Statute of Limitations is a question which the law courts have constantly to determine. At one time it was held that a positive *refusal to pay* was a good enough acknowledgment. The tide of authorities, however, turned; and no acknowledgment is now sufficient for the maintenance of an action if it stops short of being such an admission of a debt being due that a promise to pay may be implied. Such expressions, for instance, as—"Doubtless I did owe the money, but I have already paid it;" "I admit the debt, but I have got a set-off;" "The debt is barred by the Statute of Limitations;" "I know I do owe the money, but the bill I gave is on a threepenny stamp, and I will never pay it," would not be sufficient. On the other hand, where there is an unqualified acknowledgment of a debt, a promise to pay will be inferred. A letter, for instance, from a debtor to his creditor, asking him please to "send in his account" would be sufficient.

A'Court
v. Cross,
3 Bing.Quincey v.
Sharp, 45
L. J. (Ex.).

When, as in the leading case, the debtor has made a conditional promise to pay, the creditor, if he wishes to win his cause, must prove affirmatively the performance of the condition. In a very recent case the debtor had said he would pay "as soon as his position became somewhat better." The creditor could not prove that the man had been left a handsome legacy, or that his fortunes had in any way improved, and so he lost his money.

"The law on the subject," says Cleasby, B., in 1877, "is most clearly summed up by Mellish, L.J., *In re River Steamer Co., Mitchell's Claim*, L. R. 6 Ch. :—"There must be one of these three things to take the case out of the statute. *Either* there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, *secondly*, there must be an unconditional promise to pay the debt; or, *thirdly*, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

Meyerhoff
v. Proch-
lich, 4 C.
P. D.

It is to be observed that tho', when *Tanner v. Smart* was decided, an acknowledgment might be by word of mouth, it is now required by statute to be in writing and signed (a).

Skeet v.
Lindsay,
2 Ex. Div.

Acknowledgment by Joint Contractor, &c.

WHITCOMB v. WHITING.

[95.]

[2 DOUGL. & S. L. C.]

Whiting and Jones made a joint and several promissory note, which in the course of time came into the hands of the plaintiff. Eight or ten years after the day on which it was made, the plaintiff sued Whiting, who had long ago forgotten his little undertaking. "Yes," said Whiting, "that certainly must be my signature, and, now you come to mention it, I *do* remember something about a promissory note. But, you see, the date of that note is more than six years ago; so I have the law of you." "That's all very

(a) 9 Geo. IV. c. 14, s. 1 (Lord Tenterden's Act), and 19 & 20 Vict. c. 97, s. 13 (Mercantile Law Amendment Act).

fine, Mr. Whiting," replied the holder with a chuckle, "but you may be interested to learn (mark the pun, Mr. Whiting) that Mr. Jones, the gentleman whose name is with yours on this bit of paper, has paid interest on it within the last six years; and, if I'm not pretty well mistaken, that takes it out of the statute *as against you as well as against him.*"

And so it proved. "Payment by one," said my Lord Mansfield, "is payment for all, the one acting virtually as agent for the rest." "The defendant," said Willes, J., "has had the advantage of the partial payment, and therefore must be bound by it." In explanation of this last remark it may be suggested that probably all the ten years Jones was punctually paying the interest, so that Whitcombe had no desire to enforce payment of the principal. Then Jones suddenly foundered in the ocean of insolvency, and it became necessary to see whether the other joint contractor was any good.

By 9 Geo. IV. c. 14 partly, and by 19 & 20 Vict. c. 97 completely, the doctrine of this case was altered; and a Mr. Whiting of 1879 would not be prejudiced by the payment or other acknowledgment of a joint contractor. He would be able to shelter himself behind the Statute of Limitations and snap his fingers at his creditor.

Goodwin v.
Parton,
41 L. T.,
N. S.

In a very recent case in which the question was whether one of two partners must be presumed, in the absence of proof to the contrary, to have authority to make a payment on account of a debt due by the firm, so as to take the debt out of the Statute of Limitations as against the other,—held, that he must—Lush, J., said: "The cases on the subject, which, of course, vary in their circumstances, are no guide to the decision of this or of any other case, except so far as they develop the principle which ought to be applied. They lay down the following conditions as necessary to constitute a part payment so as to prevent the operation of the statute.

"*First*, the payment must be shown to have been a payment of part, as part, of a larger sum—a payment which, tho' not in fact sufficient to cover the demand, was made on the supposition that it was sufficient, or which was accompanied with expressions or circumstances showing that the debtor did not intend even to pay more, will not suffice.

"*Secondly*, the payment must have been made on account of, or

must with the assent of the debtor have been appropriated to the debt sought to be recovered.

“*Thirdly*, since the Mercantile Amendment Act (19 & 20 Vict. c. 97) payment by one of two joint debtors, tho’ professedly made on behalf of both, will not prevent the statute running in favour of the other, unless it appears that he either authorised or adopted it as a payment by him as well as by his co-debtor.”

Accord and Satisfaction.

CUMBER v. WANE.

[96.]

[1 STRANGE & S. L. C.]

Wane owed Cumber £15, and wondered how he should pay it. In a genial moment Cumber rejoiced his debtor’s heart by telling him that, if he paid £5, it would do. Wane thanked him, sat down quickly, and wrote out his promissory note for that amount. But after a while it repented Cumber of his generosity, and he went to law for the whole £15. Wane pleaded that the plaintiff had agreed to accept £5 in full satisfaction for the debt of £15, and that he had paid the £5. Tho’ perfectly true, this was not considered a satisfactory plea, and the unfortunate Wane was compelled to pay the remaining £10.

The principle on which *Cumber v. Wane* proceeds is, that there is *no consideration for the relinquishment of the residue*; so that whenever there is a benefit, or legal possibility of a benefit, to the creditor, the doctrine that the payment of a smaller sum is no satisfaction of a larger one does not apply.

For that reason,

1. Something of a different nature, tho’ of less value, *e.g.*, an old pair of slippers (which may have been worn by Alexander the Great, or have a fancy value quite apart from their intrinsic usefulness), or a peppercorn, may be pleaded in satisfaction of a debt of £10,000. For this reason a negotiable instrument (by the way, it must be

- taken that in *Cumber v. Wane* the note was not negotiable) for £5 might very successfully be pleaded in satisfaction for a debt of £15.
- Sibree v. Tripp*, 15 M. & W. 2. So may a payment, smaller indeed, but *earlier* than originally stipulated for, or made at a different place.
- Pinnel's case*, 5 Co. 3. So when there is a dispute as to the exact sum due.
- Rideal v. G. W. Ry. Co.*, 1 F. & F. 4. The doctrine does not apply to unliquidated damages, for it is not known what is really due to the plaintiff. Railway companies occasionally succeed in entrapping their victims into agreements of this kind. In such a case the question for the jury is whether the plaintiff's mind went with the terms of the paper he signed.
5. Under the Bankruptcy Act, 1869, a debtor may be discharged from obligations by his creditors accepting a composition.
- It is to be observed that a smaller sum may be pleaded in satisfaction of a greater if a receipt is given under seal. Moreover, payment of part may sometimes be evidence of a gift of the remainder.
- Fitch v. Sutton*, 5 East.

Tender.

[97.]

FINCH *v.* BROOK.

[1 BING. N. C.]

Money disputes having arisen between Mr. Finch and Mr. Brook, and litigation being imminent, Mr. Brook sent his attorney to Mr. Finch to pay what he believed to be the amount of his debt. Accordingly, Brook's attorney called on his client's creditor, and said, "I am come, Mr. Finch, to pay you the £1 12s. 5*d.* which Mr. Brook owes you," whereupon he put his hand into his pocket to come at the coin. Finch, however, testily replied, "I can't take it, the matter is now in the hands of my attorney," and so the lawyer took his hand out of his pocket again without producing the money. The question was whether this constituted a valid tender, and it was held that it did not, for there was neither production of the money nor dispensation with production (a).

(a) The court, however, seems to have thought that, if the jury had chosen to do so, they might very well have inferred dispensation.

The reason why the law attaches so great importance to the production of the money is that "the sight of it may tempt the creditor to yield." A tender, however, is valid, tho' there is no production, if the creditor dispenses with it; as, for instance, where a debtor called on his creditor and said he had £8 18s. 6d. in his pocket to pay his debt with, whereupon the creditor exclaimed, "You needn't give yourself the trouble of offering it, for I'm not going to take it."

Douglas v. Patrick,
3 T. R.

A tender to be worth anything must be *unconditional*. "If you will give me a stamped receipt, I will pay you the money," said a debtor once, and pulled out the money as he spoke. But the tender was held bad for the condition.

Laing v. Meader,
1 C. & P.

A tender to be good must be made to the principal, or to a person authorised by him to receive the money. In a very recent case the question arose as to whether a solicitor's clerk, who, having had no instructions on the subject, refused to take the money tendered, had sufficient implied authority to represent his employer for the purpose; but a disagreement of doctors leaves the point undecided.

Finch v. Boning,
4 C. P. D.

A tender to be valid must be of the whole debt due. Tender of a part of the debt is inoperative. If, however, the creditor's claim consists of a number of distinct items, the debtor may make a tender of payment of any one of them, provided that he carefully specifies the particular claim in respect of which he makes a tender. A tender may, of course, be made of a larger sum of money than the amount of the debt, but the debtor must not demand change.

Strong v. Harvey,
5 Bing.

A tender properly made and pleaded is a complete answer to the plaintiff's claim so far as his action is concerned, for it shows it to have been unnecessary. "The principle of the plea of tender is that the defendant has been always ready to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it."

Dixon v. Clark,
5 C. B.

Construction of Contracts.

ROE v. TRANMARR.

[98.]

[WILLES & S. L. C.]

A deed bade fair to become void altogether as purporting to grant a freehold *in futuro*—a thing which the law does not allow. It was saved, however, from this untimely

fate by the merciful construction that, tho' void as what it purported to be, it might yet avail as a covenant to stand seised, the court citing the maxim, *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*.

In construing a written contract (which construction is for the court) the *intention* of the contracting parties must be looked to, the sense in which the promisor believed that the promisee accepted the promise being the principal test. But, on the other hand, it is of no consequence what the intention of the contracting parties was if their written agreement, tho' totally inconsistent with such intention, is precise and clear.

The chief rules of construction, having the object of getting at the intention of the parties, are the following:—

1. The construction must be *reasonable*. One surgeon sold his business to another, and covenanted not to practise within a certain distance. On the reasonable construction of this covenant it was held that it was not broken by the retired surgeon's acting in an emergency, so long as he was not trying to get back his practice.

Rawlinson
v. Clarke,
14 M. & W.

2. The construction must be *liberal*. The masculine may be understood to include both genders. This is a very familiar rule of construction. When we say that "All men are sinners," or that "All men are mortal," we do not mean to say that the ladies are *not*. If a licence were given to kill any beast of the chase in Sherwood Forest *except bucks* the exception would be taken to cover *does* too.

3. The construction must be *favourable*; that is, favourable to the agreement meaning something, and not becoming mere waste paper. If it is possible to put two constructions on an agreement,—one which would make it illegal and void, and the other which would not, the latter view must be taken. *Roe v. Tranmarr* may be taken as an illustration of this.

4. Words (unless usage has given them a technical meaning) are to be construed in their ordinary popular sense. An annuity was to become void if a married woman separated from her husband "associated" with a bad fellow. It was held that to receive the man's visits whenever he chose to call was "associating" with him.

Dormer v.
Knight,
1 Taunt.

5. The whole of the contract is to be considered; *ex antecedentibus et consequentibus fit optima interpretatio*. Even the recitals may throw important light on what was intended.

6. When a doubt about the meaning of words arises the court ought to incline to take them contrary to the interest of the writer. *Verba fortius accipiuntur contra proferentem*; the law shrewdly suspecting that every man will take care to guard his own interests. This rule, however, is only to be resorted to as a last resource.

Measure of Damages in Contract.

HADLEY v. BAXENDALE.

[99.]

[9 EXCH.]

Messrs. Hadley and Co. were millers at Gloucester, and worked their mills by a steam-engine. In May, 1853, it happened unfortunately that the crank shaft of the engine broke, and their mills suddenly came to a stand-still. With a view to remedying the disaster, they communicated immediately with Messrs. Joyce and Co., engineers of Greenwich, and settled to send them the broken shaft that it might form the pattern for a new one. They then sent a servant to the office of the defendants, the well known firm of carriers trading under the name "Pickford and Co.," to arrange for the carriage of the broken shaft. The servant found a clerk at the office, and that gentleman informed him that, if sent any day before 12 o'clock, the shaft would be delivered the next day at Greenwich. On the following day, accordingly, before noon, the shaft was received by the defendants for the purpose of being conveyed to Greenwich, and £2 4s. was paid for its carriage for the whole distance. It chanced, however, through the negligence of the defendants, that the shaft was *not* delivered the next day at Greenwich; and the consequence was that Messrs. Hadley and Co. did not get the new shaft till several days after they otherwise would have done, the mills in the meantime remaining silent and idle, to the not small pecuniary loss of their proprietors.

It was for the loss of those profits which they would have made if the new shaft had come to them when they expected it that this action was brought; and the question was whether the damages were too remote. It was held

that if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable. But it did not appear that he knew that the want of the shaft was the only thing which was keeping the mill idle.

When two persons sit down to make a contract, they are seldom so optimistic as not to consider the possibility of the other party proving faithless and breaking his contract. What will be the consequence to me of this fellow's not keeping his promise? is a thought that is sure to be passing through the mind of each contracting party. This is the key to the measure of damages arising out of breach of contract. The damages payable in such a case are those which arise naturally, or may be reasonably supposed to have been in the contemplation of the parties at the time the contract was made as the probable result of a breach of it.

Three rules may be deduced from *Hadley v. Baxendale* :—

1. That damages which may fairly be considered as arising naturally from the breach are recoverable.

Not long ago a person sold a cow, warranting that it was free from disease. As a matter of fact it had the foot and mouth disease, and infected the purchaser's other cows. All the cows died, and the vendor was held responsible for the entire loss, on the ground that he could never have supposed that the cow he sold was intended for a life of solitary confinement. He must have known that the breach of warranty would lead to precisely what actually happened.

Smith v. Green,
1 C. P. D.;
and see
Randall v. Raper,
E. B. & E.
L. R. 1
C. P.

The similar and well-known case of *Mullett v. Mason* was different from this case, because there the vendor had not only warranted but given a fraudulent misrepresentation.

So, too, any increased cost to which a person is put, from the necessity of doing himself what he had contracted that someone else should do for him, is recoverable, if what he does is the fair and reasonable thing to do under the circumstances. On this point *Le Blanche v. The London & North Western Railway Company* (p. 52) may be consulted.

2. Damages, not arising naturally, but from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract.

Hadley v. Baxendale went off on this point. The special circumstances, tho' hinted at, were not so fully disclosed that the defendants were aware that the want of the shaft was the only thing which kept the mills idle.

In another case, an ironworks company agreed to sell the plaintiff the hull of a derrick and deliver at a time fixed. They believed that

he wanted it for a coal store. As a matter of fact he wanted it for trans-shipping coals from colliers into barges. The former was the ordinary, and the latter an extraordinary use of the derrick. They were late ; and were held liable for the profits which would have been made by the ordinary, but not by the extraordinary use of the derrick during the period of delay.

3. Where the special circumstances are known to the person who breaks, and the damage complained of flows naturally from the breach of the contract under those special circumstances, such special damage is recoverable. 3 Q. B.

Cory v. Thames Ironworks Co., L. R.

This rule, however, cannot be said to be entirely free from doubt, and should probably receive this qualification—"The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition."

The case of *Horne v. Midland Railway Company* may be fully remembered. Early in 1871 the plaintiffs contracted to supply a quantity of shoes at 4s. a pair for the use of the French army. They were to be delivered by a particular day, or they would be thrown back on the plaintiffs' hands. The plaintiffs delivered these shoes in good time at Kettering, and gave notice to the station-master there that they were under contract to deliver on that day, and that if not so delivered the shoes would be thrown on their hands; but no further information was given. Somehow the shoes were not delivered in time, and, doing the best they could, the plaintiffs could only sell the rejected shoes at 2s. 9d. a pair, and the plaintiffs brought this action to recover from the company the difference between 4s. and 2s. 9d. on each pair. It was held, however, not without considerable difference of opinion, that they could not. "In *Hadley v. Baxendale*," said Blackburn, J., "it is said that, if special notice be given, the damage is recoverable, tho' there be no special contract, and this has been repeated in various cases; but it is noticeable that there seems to be no case where it has been held that if notice be given abnormal damages may be recovered; and I should be inclined to agree with my brother Martin that they cannot unless there be a contract. But it is not necessary to decide this question, because here in fact there was no such notice; the notice here given conveys full information that the day is of consequence, and that the goods should be delivered on the 3rd of February if the defendants could, from which a contract of sale on which there was a profit might be inferred; but there was no notice that the defendants would have to pay the amount of loss claimed. Therefore, it is not necessary to decide whether the dictum in *Hadley v. Baxendale* is law, tho' I confess that at present I think it a mistake."

Per Willes, J., in British Columbia Saw Mill Co. v. Nettleship, L. R. 3 C. P. 42 L. J., C. P.

1 Q. B. D.; The case, too, of *Simpson v. London & North Western Railway* and see *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. *Company* deserves attention. It was an action by a cattle spice manufacturer against a railway company for not delivering spice samples, &c., which the plaintiff had been exhibiting at a cattle show at Bedford, in time for another show at Newcastle-on-Tyne. The plaintiff had not distinctly told the railway people that the goods he was sending were samples intended for exhibition at the Newcastle show, but he had said they must be there "on Monday certain," and the circumstances could leave no doubt in the minds of the defendants what the man's purpose was. Accordingly, the plaintiff was held entitled to recover damages both for loss of time and loss of profits. "The law," said Cockburn, C.J., "as it is to be found in the reported cases, has fluctuated; but the principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."

It often happens that a person defends an action which ought really to have been defended by someone else, and difficult questions arise as to the former's rights against the latter. The costs of the action unsuccessfully defended cannot generally be recovered, but the damages which the jury have found may. See, however, on this subject Order XVI., Rule 17, of the Judicature Act.

Baxendale v. L., C. & D. Ry. Co., L. R. 10 Exch., and *Fisher v. Val de Travers Asphalte Co.*, 1 C. P. D. *Valpy v. Oakeley*, 16 Q. B., and *Ogle v. Vane*, L. R. 2 Q. B. *Brown v. Muller*, L. R. 7 Ex. *Roper v. Johnson*, L. R. 8 C. P.

In the action for not accepting goods sold, or for not delivering them, the measure of damages is the difference between the contract price and the market price of similar goods at the time when they ought to have been accepted or delivered. And if a number of different periods were fixed for the acceptance or delivery of the goods, the damages are the sum of the differences at those periods. It has been expressly held (in a case in which the defendant had agreed to sell the plaintiff 3000 tons of coal to be delivered during May, June, July, and August, 1872, and the action was commenced on July 3rd in that year) that that is the way the damages are to be arrived at, altho', on a complete breach of contract, the action is brought before the periods of delivery have all come.

*Penalties and Liquidated Damages.***KEMBLE v. FARREN.**

[100.]

[6 BING.]

Something more than half a century ago an actor and a manager sat down and made an agreement. The actor on his part undertook to act as principal comedian at the manager's theatre (Covent Garden) for four seasons, and in all things to conform to the regulations of the theatre; while the manager agreed to pay the actor £3 6s. 8d. a night, and to allow him a benefit once every season. And the agreement contained this clause, "that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*"

For some reason or other—it does not matter what—during the second season the actor refused to act, and the manager now went to law to recover the whole £1000 mentioned in the agreement, altho' he was quite prepared to admit that he had not sustained damage to a greater extent than £750.

The manager, however, did not succeed, for the court said that it could never be taken to be the intention of the parties that the whole £1000 should instantly become payable on the happening of any breach, however trifling. And so the manager had to be content with £750.

It is not always, however, that a court will interfere in this way,

and pronounce what the parties call liquidated damages to be really only a penalty. If the agreement, for instance, were not—as it was in *Kemble v. Farren*—an agreement containing *various stipulations of various degrees of importance*, but there were only one event upon which the money was to become payable, or if there were several events but the damages impossible to measure, then no attempt to turn liquidated damages into a mere penalty would be successful.

See *Green v. Price*,
p. 100.

Primâ facie the word *penalty* in an agreement really means penalty. But the surrounding circumstances may show that the parties intended the sum to be considered *liquidated damages*. A generation ago a young surgeon at Macclesfield agreed with another surgeon that, if the latter would take him as assistant, he would never practise at or within seven miles of Macclesfield “under a penalty of £500.” In spite of the word “penalty” having been thus used, it was held that the whole £500 was payable as liquidated damages. “This agreement,” said Wilde, C.J., “does not prohibit the defendant’s doing several distinct and independent acts, each of which might be incapable of exact estimation. . . . The whole object of the plaintiff was to protect himself from a rival; and it would be impossible in such a case to say precisely what damage might result to him from a breach of the agreement: it is not unreasonable, therefore, that the parties should themselves fix, and ascertain the sum that should be paid. And I think we can only give effect to the contract of the parties by holding the £500 to be liquidated damages and not a mere penalty.” And Coltman, J., said, “Altho’ the word ‘penalty’ which would *primâ facie* exclude the notion of stipulated damages is used here, yet we must look at the nature of the agreement and the surrounding circumstances.”

Sainter v. Ferguson,
7 C. B.

The whole thing is a question of intention, and, where there is doubt, the leaning of the court is in favour of a penalty.

Injuria and Damnum.

[101.]

ASHBY v. WHITE.

[LORD RAYM. & S. L. C.]

Through tory trickery, the vote of a respectable elector at Aylesbury was rejected at the poll. As it happened, the candidates for whom the gentleman had intended to vote were elected. But in spite of his thus having

sustained no actual damage, he brought an action against the returning officer, and, after much discussion and many storms, it was held that such an action could be maintained. Lord Chief Justice Holt, whom the student should at once make one of his legal heroes, covered himself with glory as with a cloak. He was unanimously overruled in his own court;—"My brothers," he said, "differ from me in opinion; and they all differ from one another in the reasons of their opinion; but, notwithstanding their opinion, I think the plaintiff ought to recover." And when the case went up to the Lords, their Lordships thought so too.

CHASEMORE *v.* RICHARDS.

[102.]

[7 H. L. C.]

A town cannot easily have too good a supply of water, and no doubt the Local Board of Health for the town of Croydon were public benefactors when in 1851 they sank a substantial well and supplied the good people of Croydon with pure water at the rate of 600,000 gallons a day. But the public gain was Mr. Chasemore's loss. That gentleman was the occupier of a mill situated on the river Wandle about a mile from Croydon, and had,—he and his predecessors,—used the river for the last seventy years for turning his wheels. It may well be imagined, therefore, that he was extremely disgusted to find that the effect of what the Local Board had done was to prevent an enormous quantity of water from ever reaching the Wandle or his mill. The miller, they say, wots not of all the water that goes by his mill. Very likely. But Chasemore wotted of a good deal of water that did *not* go by his mill, and went to law. Unfortunately, however, he was not successful. The judges told him that, tho' he was very much to be sympathised with, he had no legal remedy. There was *damnum*, they said, but not *injuria*.

These two cases pretty clearly illustrate the distinction between *injuria sine damno* and *damnum sine injuria*. Wherever a person has sustained what the law calls an "injury," there he may bring an action without being under the necessity of proving special damage, because the injury itself is taken to imply damage. A banker once dishonoured the cheque of a customer who really had plenty of money in the bank, and the customer thereupon brought an action against him. It was held that the action was maintainable, altho' the plaintiff had not sustained any loss whatever by the banker's wrongful act. There was no *damnum*, but there was *injuria*, and that was quite sufficient. In *Ashby v. White* the defendant's counsel cited unsuccessfully the maxim *de minimis non curat lex*, contending that, even if Mr. Ashby had sustained some damage, it was one of so infinitesimal a character as to be unworthy of notice. It was also objected that there was no precedent for such an action, but Lord Holt replied that if men will multiply injuries, actions must be multiplied too.

Marzetti v. Williams,
1 B. & Ad.

On the other hand it is not everything that the law brands as an "injury." The most terrible wrongs may be inflicted by one man on another without redress being obtainable. If you are driving a flourishing trade as a schoolmaster, and I come and set up a school just opposite to yours, and the boys desert you and flock to me, there is no "*injuria*" here, even tho' I may have turned schoolmaster for the express purpose of ruining you. It is *damnum sine injuria*, and you have no right of action against me. This is the stock illustration; but perhaps the most flagrant is the absence of redress against a seducer when service cannot be duly proved. In the very recent case of *Attorney-General v. Tomline* these principles were discussed. That was an action on behalf of the War Secretary to restrain a lord of a manor from removing shingle so as to endanger Crown land on which a Martello tower stood. It was considered that to remove shingle in the way the defendant had done was a natural user of land, and *damnum*, not *injuria*.

12 Ch. Div.

Chasemore v. Richards is a case of some importance on the subject of water-courses. Every riparian owner is entitled to take a reasonable quantity of the water flowing in a natural stream without regard to the interests of owners lower down. But to entitle him to pen it back, or divert, or pollute it, he must show authority derived from grant, prescription, or the like. About a year ago Lord Sandwich brought an action against the Great Northern Railway Company for taking too much water out of the Ouse at Huntingdon. The line crosses the river there, and the company of course require a quantity of water for satisfying their thirsty engines, and for the general purposes of their station. Lord Sandwich said that his tenant, the miller, lower down the stream, did not get

Wood v. Waud,
3 Exch.,
and
Embrey v. Owen,
6 Exch.

enough water in consequence of the large quantity abstracted by the railway company. But it was shown that in wet weather the grumbling miller got quite as much water as he wanted—perhaps rather more, unless he also deals in umbrellas—whereas even in dry weather the working of the mill was only shortened for a few minutes a day. And so it was held that the railway company had kept well within their rights.

Sandwich
v. *G. N.*
Ry. Co.,
10 Ch. Div.

Sic utere tuo ut alienum non lædas.

FLETCHER v. RYLANDS.

[103.]

[L. R. 3 H. L.]

Messrs. Rylands and Co., some enterprising mill-owners, made a reservoir, employing a competent engineer and first-class workmen. During the construction of it, the workmen came upon some old vertical mine shafts, of the existence of which no one was previously aware. These they carefully filled up with soil. But, when the water came to be put into the reservoir, it was just like putting it into an empty flower pot. It ran through, and did a world of mischief to the neighbouring mines of Mr. Fletcher, who instituted legal proceedings. Messrs. Rylands and Co. defended the action, thinking that as they had employed competent persons to construct the reservoir they would not be held responsible. But they were mistaken. On the ground that a person who brings on his land anything which, if it should escape, may damage his neighbour does so at his peril, negligence or not being quite immaterial, they were compelled to compensate Mr. Fletcher for the damage the water had inflicted on his mines.

[104.]

NICHOLS v. MARSLAND.

[2 Ex. D.]

Mrs. Marsland was the fortunate proprietor of some ornamental lakes in the county of Chester. She had not made the lakes herself. They had existed time out of mind, and had always borne the character of being sober, respectable, well-behaved lakes. But on the 18th of June, 1872, there came a tremendous storm, the like of which the oldest inhabitant could not remember. The rains descended, the floods came, and Mrs. Marsland's lakes burst their fetters, and, in the riot of their new-found liberty, swept into eternity two or three county bridges. Nichols was the county surveyor of Cheshire, and brought this action for the damage done. It was argued for the surveyor, with much plausibility, that Mrs. Marsland was in the same position as a person who keeps a mischievous animal with knowledge of its propensities, and therefore that enquiry as to whether she had been negligent or not was needless,—she kept the lakes at her peril. It was held, however, that as the lakes had been carefully constructed and maintained, and the downpour of rain was so extraordinary as to amount to *vis major*, the county bridges might build themselves up,—it was no concern of the old lady's.

"A man must keep his own filth on his own ground," says an old case in Salkeld, and the principle is the foundation of *Fletcher v. Rylands*. By all means do what you will with your own, but *sic utere tuo ut alienum non lædas*. For this reason, when a man brings on to his land anything that will do damage to his neighbour if it escapes, he keeps it at his peril. It has long been a settled legal principle that a person who keeps a savage animal, such as a tiger or a lion, does so at his peril; if the animal escapes and hurts anyone, it is not incumbent on the injured party to show that the owner knew that the animal was mischievous. He can recover damages without doing so. It is different when the animal which

has done the mischief is naturally domestic and peaceable. It is then necessary for the plaintiff to show that the defendant was aware of its ferocious disposition. In technical language, there must be proof of the *scienter*. A man, however, is responsible for the trespasses of his cattle and other animals. About five years ago a horse and mare in adjoining fields had a little dispute about some equine matter, and finally the horse (with a sad lack of gallantry) kicked the mare through the fence. It was held that the owner of the horse, quite apart from any question of negligence, was liable for the injury so done to the mare. "Having looked into the authorities," said Brett, J., "it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass."

Ellis v. Loftus Iron Co.,
L. R. 10
C. P.

If the thing causing the mischief has no tendency to escape, it does not come within the above principle. Yew leaves, for example, are poisonous to cattle, but they have no tendency to escape; and therefore an action could not be brought by a neighbour who had nothing better to say for himself than that his cattle were poisoned by yew leaves, and that the yew tree grew on the defendant's land.

If, however, the poisonous tree projected over into the plaintiff's field, it would be different.

Nichols v. Marsland engrafts on the rule of *Fletcher v. Rylands* the qualification that, altho' a man brings on to his land what will do damage if it escapes, still he is not responsible if the escape is due to causes beyond his own control and amounting to *vis major*.

Wilson v. Newberry,
L. R.
7 Q. B.

Similarly, if A. were to bore a hole in B.'s cistern, or if a rat were to eat a hole, whereby C.'s premises were flooded, B. would not be liable to C.

Crowhurst v. Amersham Burial Board,
4 Ex. Div.

And when plaintiff and defendant occupy different storeys of the same house, it is generally necessary to prove actual negligence before the latter can be made responsible to the former, say, for a water-closet getting out of order and discharging its contents into the rooms below.

Carstairs v. Taylor,
L. R. 6 Ex.;
and see
Box v. Jubb,
4 Ex. Div.

It may be remarked, as to the liability of neighbouring mine-owners, that it has been held that the owner of a colliery lying on a higher level than another is not responsible for damage done to the latter by its being flooded through the usual and proper taking of coal from the former.

Ross v. Fedden,
L. R.
7 Q. B.

The maxim *sic utere tuo etc.* has received two of its latest illustrations from the cases of *Hurdman v. North Eastern Railway Company* (where the defendants were held responsible for having on their own land built an artificial mound so close to the plaintiff's house as to

Smith v. Kendrick,
7 C. B.
3 C. P. D.

render it damp and unhealthy by the rain oozing through), and
 3 C. P. D. *Firth v. Bowling Iron Company* (where a Yorkshire cow had swallowed
 See also a bit of poisonous wire rope negligently left by the defendants on
West Cum- their land, and not digested it—held, that the defendants were
berland, liable).
&c., Co. v.
Kenyon,
 40 L. T.,
 N. S.

Proximate Cause.

[105.]

SCOTT v. SHEPHERD.

[2 W. BL. & S. L. C.]

Mr. Shepherd, of Milbourne Port, determined to celebrate the happy deliverance of that august and wise monarch James I. in the orthodox fashion; and, with that intention, he some days before the 5th laid in a plentiful pyrotechnic supply. Being not only of a pious and patriotic spirit, but also a man not destitute of humour, he threw a lighted squib into the market house at a time when it was crowded with those that bought and sold. The fiery missile came down on the shed of a vendor of ginger-bread, who, to protect himself, caught it dexterously and threw it away from him. It then fell on the shed of another ginger-bread-seller, who passed it on in precisely the same way;

“And by two mesne tossings thus it got
 To burst i’ the face of plaintiff Scott,”

putting the unfortunate fellow’s eye out.

Scott brought an action against the original thrower of the squib, who objected that he was not responsible for what had happened, when the squib had passed through so many hands; but, tho’ he persuaded the learned Mr. Justice Blackstone to agree with him, the majority of the court decided that he *must be presumed to have contemplated all the consequences* of his wrongful act and was answerable for them.

SHARP v. POWELL.

[106.]

[L. R. 7 C. P.]

In defiance of an Act of Parliament, a corn merchant's servant washed one of his master's vans in the street of a town. If it had been nice balmy weather no harm would have come of this improper proceeding; the water would have found its way down a gutter and through a grating. But it happened to be very frosty weather, and (unknown to the law-breaking servant) the grating was frozen over. The consequence was that the water, finding no escape, flowed about promiscuously and formed a great sheet of ice, over which the plaintiff's horse slipped and got hurt.

The owner of the injured horse brought an action against the corn merchant, but it was held that, however improper it might be to wash a van in the public street, this was *not the proximate cause* of the injury; for the servant could not be expected to foresee that the consequence of his act would be that the water would freeze over so large a portion of the street as to occasion a dangerous nuisance.

Probably no case, except perhaps *Coggs v. Bernard*, is better known to the superficial student than "the squib case." It cannot be said, however, that its importance is equal to its popularity. In days gone by it served to illustrate the distinction between the action of trespass and the action on the case; but it is now chiefly worth remembering as an authority on questions of consequential damage.

The rule is that damage to be actionable must be the ordinary and probable consequence of the act complained of; in other words, the act must be the proximate cause of the damage. If a candidate for parliamentary honours makes a stump oration inveighing at his opponents generally, and waves his hat into the bargain, that is not the proximate cause of one of those opponents getting his windows or his head broken. Generally, however, a man must be taken to contemplate all the consequences of his acts, and is responsible for them. A railway company negligently sent some empty trucks down an incline into a siding. The consequence was that a herd of cattle being driven along an occupation road got frightened, ran away, and after breaking down a fence or two succeeded in getting killed

Peacock v. Young,
18 W. R.
(Q. B.)

Sneeshy v. Lancashire & Yorkshire Ry. Co., L. R. 9 Q. B.

on quite another part of the company's line. The company were held responsible to the owner of the cattle. In a very recent case the following facts appeared. The occupier of a field used for athletic sports put a barrier with iron spikes across the adjoining road, in order that the British public might not see the sports without paying. Somebody removed this barrier, and put it in a dangerous position across the footpath. The plaintiff was lawfully passing along this footpath at night, when his eye came into contact with one of the spikes. It was held that the occupier of the field, who had taken liberties with the queen's highway which he had no right to take, was liable notwithstanding the intervention of a third party. To take a still more recent case, the proprietor of a van and ploughing apparatus left it by the grassy side of a road to remain there all night. While it was there a farmer came by driving a mare, a confirmed kicker, tho' not so to his knowledge. The brute shied at the van, ran away, and kicked the farmer to death. In an action under Lord Campbell's Act, it was held that the van-proprietor was liable. "Tho' the immediate cause of the accident," said the Court, "was the kicking of the mare, still the unauthorised and dangerous appearance of the van and plough on the side of the highway was within the meaning of the law the proximate cause of the accident."

Clark v. Chambers, 3 Q. B. D.

Harris v. Mobbs, 3 Ex. Div.

Vandenberg v. Truax, 4 Denis, New York.

The principle of *Scott v. Shepherd* has been applied in a curious American case, where the defendant (with a certain amount of provocation) had seized a pickaxe and chased a little black boy through the streets of a town. The boy, in terror for his life, bolted into the plaintiff's store, and in his hurry knocked over a cask of wine. It was held that the defendant must pay for the good liquor lost. "There is nearly as much reason," said the Court, "for holding him liable for driving the boy against the wine cask, and thus destroying the plaintiff's property, as there would have been if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned."

Negligence.

[107.]

READHEAD v. MIDLAND RAILWAY CO.

[L. R. 4 Q. B.]

Mr. Readhead has achieved immortal fame by a certain

railway journey which he once took. He was a second-class passenger from Nottingham to South Shields, and on the journey the carriage in which he was travelling left the metals and was upset. This mishap was occasioned by the breaking of the tyre of one of the wheels of the carriage, owing to a latent defect in the tyre, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking. This being so, it was held that, tho' Mr. Readhead might have sustained very severe injuries and be in every way a person deserving of sympathy, the company were under no obligation to make him compensation. Accidents, as the vulgarism has it, will happen in the best regulated families.

The carrier of *goods* impliedly warrants their safety ; the law considers him an insurer thereof, and if they do not arrive safely at their destination, he must—act of God and queen's enemies excepted—make good the loss, whether he has been negligent or not. The common law knew well what it was about when it imposed this liability on carriers of goods, for in the good old times it was not an unknown thing for such gentry to collude with highwaymen and divide the spoil.

But carriers of *passengers* stand on quite a different footing. They do not insure the limbs or lives of their customers, and express proof of negligence must be given before one of their victims can secure the smallest *solatium* for the loss of an arm or a leg. Their duty is “to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and is *not* a warranty that the carriage in which he travels shall be in all respects fit for its purpose.” It may be mentioned, however, that one of the most learned of our judges, Lord Blackburn, dissented from the view ultimately adopted in Readhead's case, and, while agreeing that carriers of passengers were not insurers, was of opinion that they were bound at their peril to supply a carriage reasonably fit for the journey. And, indeed, it may be questioned whether, considering how arbitrary and how selfish railway companies can be, it would not be more consistent with public policy to impose on them that larger obligation which his lordship advocated.

One of the most ordinary actions tried at *nisi prius* is an action for personal injuries, and in such actions the great object of the

L. R.
10 Ex.

plaintiff generally is to prove that the defendant has been negligent. If the injurious act was neither wilful nor the result of negligence, the plaintiff cannot recover. A good case illustrating this is *Holmes v. Mather*, where a North Shields gentleman had tried some horses for the first time in double harness. The horses did not take kindly to it, and the plaintiff got knocked down. "The driver," said Bramwell, J., "is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it.

Crofts v.
Water-
house,
3 Bing.

. . . For the convenience of mankind in carrying on the affairs of life people as they go along roads must expect or put up with such mischief as reasonable care on the part of others cannot avoid." In another well-known case a coach-driver drove his coach on to a bank. He had been past the same spot only twelve hours before, but in the interval a cottage which served him as a landmark had been pulled down and carted away. It was held that this was an accident for which nobody could be made responsible. In such an action it is the province of the judge to say whether there is evidence from which negligence *may* be reasonably inferred, and of the jury (if the evidence is left to them) to say whether it *ought* to be inferred. "It is in my opinion," says the Lord Chancellor in a very recent case, "of the greatest importance in the administration of justice that these separate functions should be maintained distinct. It would be a serious inroad on the province of the jury if in a case where there are facts from which negligence *may* be reasonably inferred, the judge were to withdraw the case from the jury upon the ground that in his opinion negligence *ought not* to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever." And then, by way of illustration, he suggests the possible case of juries punishing unpopular and unpunctual companies by finding verdicts against them on no particular evidence.

Met. Ry.
Co. v. Jack-
son, L. R.
8 H. L.
See also
Dublin, &c.,
Ry. Co. v.
Slattery,
3 App. Ca.

Sometimes, however, the mere happening of a disaster may be sufficient to raise a presumption of negligence, which the defendant must rebut if he can. In such cases it is said—*Res ipsa loquitur*; what caused the mischief was exclusively under the defendant's control, and he ought to have taken better care of it. A gentleman

was once guilelessly walking down a Liverpool street, "*nescio quid meditans nugarum*," when suddenly a barrel of flour came down on his head from the upper window of a flour dealer's shop. In an action against the flour dealer it was held that the mere unexplained fact of the accident happening at all was evidence of negligence to go to the jury. Flour barrels ought not to tumble down on people's heads—*Res ipsa loquitur*. The same principle of law was laid down in a case where a custom-house officer, lawfully in some docks, was knocked down by a bag of sugar lowered by a crane overhead; and in a third case where a brick fell from a railway bridge and cracked the skull of a person sauntering peaceably along the queen's highway below.

On the other hand, a passenger may enter into a contract with a carrier to be carried at his own risk. In such a case no amount of negligence on the part of the carrier would be sufficient to entitle an injured passenger to bring an action against him successfully. Such a condition exempts a railway company from responsibility, not only during the journey, but while the passenger is coming to or leaving their premises. And it even extends to protect another railway company over whose line the company making the special contract have running powers. The condition is usually imposed on a drover in charge of cattle who receives a free pass.

A good many actions against railway companies are brought by persons who have sustained hurt by their trains overshooting the platforms or not getting properly up to them. The mere fact of a train's doing a thing of this kind is not of itself evidence of negligence, but in such a case it becomes the duty of the railway servants to take immediate steps to prevent people getting out and hurting themselves. The student, under such circumstances, should make as much noise as possible, and insist either on having the train brought alongside of the platform, or the assistance of at least half-a-dozen porters to help him to get down. The singing out the name of the station is, of course, not necessarily an invitation to alight.

It may be mentioned that it has been held that Lord Campbell's Act (9 & 10 Vict. c. 93) does not take away the executor's right of action for damage to the personal estate arising from medical expenses and the deceased's inability to attend to his business between the time of the accident and his death.

The case of *Francis v. Cockrell* may be referred to in connection with the leading case. The effect of it is that "where money is paid by spectators at races or other public exhibitions for the use of temporary stands or platforms, there is an implied warranty on the part of the person receiving the money that due care has been used in the construction of the stand by those whom he has employed as independent contractors to do the work, as well as by himself."

Byrne v. Boadle,
2 H. & C.
Scott v. London Docks Co.,
3 H. & C.
Kearney v. L., B. & S. C. Ry. Co.,
L.R. 6 Q.B.
McCawley v. Furness Ry. Co., L.R. 8 Q.B.
Gallin v. L. & N. W. Ry. Co.,
L.R. 10 Q.B.
Hall v. N. E. Ry. Co., L.R. 10 Q.B.
Robson v. N. E. Ry. Co., 2 Q.B. D., and
Rose v. N. E. Ry. Co., 2 Ex. Div. See also *Lax v. Darlington*, 5 Ex. Div.
Bridges v. North London Ry. Co.,
L.R. 7 H. L.
Bradshaw v. L. & Y. Co., L.R. 10 C. P.
39 L. J.
Q. B.

It has been held that the limitation as to latent defects introduced by the leading case does not apply to the sale of a chattel. In the case referred to, a man bought of a coach-builder a pole for his carriage. Tho' the coach-builder was guilty of no negligence in the matter, the pole turned out defective and broke, frightening and injuring the horses. It was held that the coach-builder was liable.

Contributory Negligence.

[108.]

BUTTERFIELD v. FORRESTER.

[11 EAST.]

Mr. Forrester was a citizen of the good town of Derby, and at the time to which our story relates was engaged in the laudable enterprise of enlarging and improving his house. This was all very well; but in carrying out his repairs he was guilty of the high-handed and unwarrantable act of putting poles across the king's highway. Just about dusk, one August evening, while things were in this improper state, Mr. Butterfield was riding home. With reckless disregard for his own and the lieges' safety, he went galloping through the streets "as fast as his horse could go;" and the reader will scarcely be surprised to hear that he rode plump up against Mr. Forrester's obstruction, and that a moment later, as the poet says (tho', if we remember right, not exclusively in reference to Mr. Butterfield), "there lay the rider distorted and pale." Conceiving, with a great deal of sense, that the most effectual way of restoring his health would be by a verdict and damages, he brought this action; but his own careless riding was held to be as complete an obstacle to his success as Mr. Forrester's pole had been to his horse. "A party," said Lord Ellenborough, C.J., "is not to cast himself upon an obstruction which has been made by the fault of another

and avail himself of it if he do not himself use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using ordinary care for himself."

DAVIES v. MANN.

[109.]

[10 M. & W.]

The owner of a donkey fettered its forefeet, and in that helpless condition turned it into a narrow lane. The animal had not disported itself there very long when by chance there came down that way a heavy waggon belonging to the defendant. The waggon was going a great deal too fast, and was not being properly looked after by its driver, and the consequence was that it caught the poor beast, which could not get out of the way, and hurled it into that bourne whence returneth neither man nor donkey. The owner of the donkey now brought an action against the owner of the waggon, and, in spite of his own stupidity, was allowed to recover, on the ground that if the driver of the waggon had been decently careful the consequences of the plaintiff's negligence would have been averted. "Altho'," said Parke, B., "the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

The doctrine of contributory negligence is based on common sense, or, to speak more learnedly, on the maxim *volenti non fit injuria*. The man who is the author of his own wrong merits nobody's sympathy; his own folly disentitles him to complain. To steal a

metaphor from our Lincoln's Inn friends, he does not come into court with clean hands. "If," says Domat, "one goes across a public cricket-ground whilst they are playing there, and the ball being struck chances to hurt him, the person to blame is not the innocent striker of the ball, but he who imprudently sought out the danger."

But *Davies v. Mann* engrafts an important qualification on the rule that the negligence of the plaintiff himself disentitles him to complain of the defendant's negligence. If the defendant by being ordinarily careful would have averted the consequences of the plaintiff's negligence—in other words, if the regrettable accident would never have happened if the defendant had behaved as he ought to have done—then the plaintiff is entitled to recover in spite of his negligence. A penny steamer negligently ran down a barge on the Thames. The barge had not ported, and no look-out was kept on board. But this undoubted negligence of the barge was held not such as to prevent her owners from obtaining compensation from the steam-boat people. In the river Colne, in Essex, an oyster bed was so placed as to be a public nuisance, yet its proprietors successfully went to law against a person who ran his vessel against it when he might have managed better. In a third and very recent case some colliery proprietors had a siding from the London and North Western Railway Company's line, and over the siding a bridge with a headway of eight feet. The London and North Western Railway Company negligently pushed a loaded truck eleven feet high against the bridge and broke it down. The jury found that the colliery proprietors as well as the railway company had been negligent in the matter, for they ought to have foreseen what was going to happen, as the loaded truck had been standing about some time; but, in spite of this negligence, they were held entitled to recover against the railway company for the damage done to the bridge, as the defendants, by the exercise of ordinary care, might have averted the mischief.

Tuff v. Warman,
2 C. B.,
N. S.
Mayor of Colchester v. Brooke,
7 Q. B.

Radley v. L. & N. W. Ry. Co.,
46 L. J. H. L.

The donkey case qualification may be put as correctly and more simply by saying that a plaintiff is not disentitled by his negligence unless such negligence was *the proximate cause* of the damage.

5 Exch.;
and see
Scott v. Shepherd,
p. 180.

As to the liability of a person for the consequences of his negligence, the following remark of Pollock, C. J., in the well-known contributory negligence case of *Greenland v. Chaplin* (where an anchor fell on a steam-boat passenger) may be quoted:—"I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this: that a person is expected to anticipate and guard against all reason-

able consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur."

Contributory negligence is no defence (probably) in criminal law. If a prisoner were indicted for manslaughter by negligence, his learned counsel would not successfully take the point that the deceased's own negligent conduct contributed to his death.

*R. v.
Swindall,
2 C. & K.*

Doctrine of Identification.

WAITE v. NORTH EASTERN RAILWAY CO.

[110.]

[E. B. & E.]

Mrs. Park and her little grandson of five years old proposed to travel by the 10.50 train from Velvet Hall to Tweedmouth. Proposing, however, is one thing, and disposing another: Mrs. Park's travelling days were done before the 10.50 train made its appearance. After taking the ticket and a half, they had to get to the opposite platform by a level crossing; and, whilst they were attempting the passage, a goods train came up unexpectedly and knocked them down. Mrs. Park was killed on the spot, but the little boy survived to go to law. The jury found that, tho' the railway servants were negligent in not having warned the good soul against the danger of crossing the line just then, yet the good soul herself in not having kept a better look-out, spectacles or no spectacles, was guilty of such negligence as would have disentitled her to recover. No attempt was made to fix the little boy himself with negligence. It was resolved, however, that for the purposes of this action he was so identified with his elderly relative that her negligence was his, and that his early career in tort must be put a stop to.

At first sight it may seem rather hard on the little boy that, without the slightest fault on his part, he should not be able to avail

himself of the company's negligence; but the injustice of it will appear less flagrant when it is remembered that for the purposes of crossing the line he had entirely surrendered his will to his grandmother's.

Thorogood v. Bryan, 8 C.B., and *Armstrong v. Lanc. & York. Ry. Co.*, L. R. 10 Ex. See, however, *Rigby v. Hewitt*, 5 Exch., and *The Milan*, 31 L. J.

The doctrine of identification has been applied to cases of the collision of vehicles. You are driving your dog-cart, we will say, at a furious and improper speed through the streets of a town, and I am going out to dinner in a hansom. My driver, as it turns out, is drunk, and, through the joint negligence of yourself and him, a collision occurs, and I am hurt. According to the more accepted view, I am so far identified with my drunken driver that his contributory negligence is mine, and I cannot make you pay for my mending.

Contributory Negligence of Children.

[111.]

LYNCH *v.* NURDIN.

[1 Q. B.]

Mr. Nurdin was an egg-merchant, and used to send his servant round Soho with a cart to deliver eggs to his customers. One day, when the man was out with the cart as usual, he imprudently left it for half an hour or so standing by itself in Compton Street, drawn up by the side of the pavement. While he was away, some little children *more suo* began playing about the cart, climbing into it, and having all kinds of games. Amongst them was a little boy, who may be said to be the hero of this thrilling narrative, aged six years. He was in the act of climbing the step with a view to securing a box seat, when another mischievous little beggar pulled at the horse's bridle. The old horse, obeying its natural master, man, moved on, and the little Lynch was thrown to the ground, and the wheel went over him.

The child successfully brought an action for damages against the egg-merchant, it being considered that he was

not guilty of contributory negligence as he had only obeyed a child's natural instinct in having a lark with the cart.

It is not to be inferred from this case that a child is incapable of such contributory negligence as disentitles him from recovering. The effect of this and other cases is to establish the rule that a child is to be judged as a child, so that we are not to expect the same degree of care from him as from such as are of riper years; but, on the other hand, he must not get into mischief to the extent of doing what he knows to be naughty: if he does, he is guilty of disenti- tling contributory negligence. It is obvious, then, that the law does not consider it "getting into mischief" to the required extent for a child of six to play with carts left unattended in the street. "The decision in *Lynch v. Nurdin*," says Parke, B., in *Lygo v. Newbold*, "proceeded 9 Exch. wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years; in short, that the plaintiff was blameless, and consequently that his act did not affect the question." The cases of *Abbott v. Macfie*, *Mangan v. Atterton* (a) 2 H. & C. and *Singleton v. Eastern Counties Railway Company* may advanta- L. R. 1 Ex. geously be referred to on this subject. In the first of these three 7 C. B., cases a child of seven, playing in a Liverpool street had pulled down N. S. on himself the covering of a cellar which the defendant had left leaning against a wall. It was held that he could not recover. In *Mangan v. Atterton* a Sheffield whitesmith left a machine for crush- ing oil-cake standing about in the street, without fastening up the handle or taking any other precaution. Forth there came bounding from the school just then the plaintiff, a little boy of four, his brother, aged seven, and some other boys. They instantly collected round the Sheffield gentleman's machine; one of them turned the handle; and then, by the direction of his brother, the plaintiff put his fingers in the cogs. The result of this scientific experiment was an action against the owner of the machine. But judgment was given for the defendant on the double ground that he had not been negligent, and that the little boy had been (a). In the third case a little girl of three got trespassing on a railway. She was sitting on the parapet of a small wooden bridge when a train came up and cut off one or two of her legs. The driver had seen the child, but made no attempt to stop the engine, contenting himself with whistling. It was held that the child could not recover damages against the company,—rather, however, because they had not been negligent at all, than because the plaintiff had been guilty of such contributory negligence as prevented her from availing herself of the defendants' negligence.

(a) This case, however, will be found severely handled by Cockburn, C.J., in *Clark v. Chambers*, 3 Q. B. D., p. 339.

*Position of Plaintiff in regard to Defendant's
Negligence.*

[112.]

INDERMAUR v. DAMES.

judgment by values &c.

[L. R. 2 C. P.]

Mr. Dames was the owner of a sugar refinery, and employed one Duckham, a gas engineer, to improve his gas-meter. Duckham got his work done by a certain Saturday evening; but it was arranged that he or one of his workmen should come on the following Tuesday to see if the improvement was working satisfactorily. Accordingly on the Tuesday the plaintiff, Indermaur, presented himself as Duckham's representative to look at the gas-meter. Now it happened that on the premises, and level with the floor, there was an unfenced shaft used for the purpose of hauling up bales of sugar. When the shaft was being used for that purpose, it was usual and necessary that it should be unfenced; but when not being used there was no particular reason why it should not be fenced. The experienced case-reader will not be surprised to hear that Indermaur was unfortunate—or fortunate—enough to fall through this shaft. The sugar people denied their liability to him, contending that he was a mere licensee, and that they were under no particular duty towards him. It was held, however, that he was *not* a mere licensee, as he had come on lawful business, and that, as the hole was from its nature unreasonably dangerous to persons not usually employed on the premises, the defendant was liable.

When a person is injured on somebody else's land and by that somebody's negligence the question is a very material one—what was he doing there?

He may have been a *trespasser*. If so, he cannot as a rule recover damages. But there are exceptions. For instance, tho' a man has

a right as against trespassers to have a dangerous pit in the middle of his field, he has no right to have one within twenty-five yards of the road. So, too, a scoundrel who set man-traps or spring-guns on his estate would not get rid of his liability by showing that the person injured was trespassing.

Secondly, the plaintiff may have been a *licensee*. In this position are guests. Whenever we go out to dinner, or stay a week at a friend's house, we are licensees, and in respect of the ability to bring an action against our host for his negligence we are little better than trespassers. "A lady with a valuable dress," said Pollock, C.B., in *Southcote v. Stanley*, "goes out to dinner, and the servant in handing the soup negligently spoils her dress: will an action lie against the master?" A licensee can only maintain an action against his licensor when the danger through which he has sustained hurt was of a *latent* character, which the licensor knew of and the licensee did not. A gentleman was once leaving a friend's house after paying a call, when a loose pane of glass fell from the door as he was pushing it open, and cut him badly. He brought an action, but failed signally, as it did not appear that his host knew what condition the door was in.

Or thirdly, the plaintiff may have been *on lawful business*. This is the best position of all to be in. Such a person has a right to immunity from all but inevitable dangers. Indermaur was considered to be in this happy position, and so in later cases were a licensed waterman who went on board a barge on the Thames to complain of its illegal navigation and get employment if possible, and a guest, on whom the ceiling of an inn room fell.

Bird v. Holbrook,
4 Bing. ;
and see
Flott v. Wilkes,
3 B. & Ad.,
and *Jordin v. Crump*,
8 M. & W.
1 H. & N.

Southcote v. Stanley,
1 H. & N.
See also
Bolch v. Smith,
7 H. & N.,
and *Corby v. Hill*,
4 C. B.,
N. S.

White v. France,
2 C. P. D.
Sandys v. Florence,
47 L. J.,
C. P.

Actions against Surveyors of Highways, &c.

McKINNON v. PENTON.

[113.]

[9 EXCH.]

This was an action against the surveyor of county bridges for the county of Cardigan. One of his bridges was so much out of repair that the plaintiff's servant, driving the plaintiff's carriage, was precipitated with the carriage from the bridge into the water. In suing for the damage thus done, the plaintiff practically admitted that

43 Geo.
III. c. 59.

the action could not be maintained at common law, but he relied on a certain Act of Parliament passed rather late in George the Third's reign, which, in his view, gave him a right of action. It was held, however, that the statute did not alter the common law in this respect, and that the action, therefore, could not be maintained.

7 H. & N.

This case was followed a few years later in *Young v. Davis*, which was an action by a foot passenger against some Oxfordshire surveyors of highways for allowing a highway to be out of repair, whereby the plaintiff fell into a hole. "It appears to me," said Pollock, C.B., in that case, "if the plaintiff is to succeed that it would be enlarging the sphere of legislation very much, and rendering it impossible to get anybody to discharge the duties of surveyor of highways; because we all know what will be the practical result. A surveyor of highways will become a sort of insurer of every one travelling along the road, and not a single accident will happen without an action being brought." But altho' a surveyor is not liable for *non-feasance*, he is for *mis-feasance*. Two or three years ago a vestry ordered their surveyor to get the level of a road raised. The surveyor, accordingly, employed a contractor for the labour part of the job, but made no agreement with him as to fencing or lighting, and reserved to himself the superintendence. The plaintiff driving along the road one night in his dog-cart was upset through not seeing the obstruction, and it was held that the surveyor was liable to him.

Pendlebury v. Greenhalgh,
1 Q. B. D.;
and see
Foreman v. Mayor of Canterbury,
L. R.
6 Q. B.
4 Ex. Div.

The very recent case of *Forbes v. Lee Conservancy Board* may be looked at in connection with the leading case. The defendants were an unpaid body of trustees, created by statute conservators of the river Lee, and the plaintiff's barge struck upon one of several submerged piles which were dangerous to navigation, and which the defendants had power to remove, but neglected to. It was held that the duty to remove obstructions being discretionary not compulsory, the action could not be maintained.

Servant Suing Master for Injury during Service.

[114.]

PRIESTLEY v. FOWLER.

[3 M. & W.]

Fowler was a butcher, and Priestley was his man. It was Priestley's interesting duty to take meat round in a

van to the various customers. These seem to have been pretty numerous, for one day such a quantity of shoulders of mutton and rounds of beef were put on board that the van broke down, and Priestley's thigh was fractured. The unfortunate butcher-boy now brought an action against his master, but it was held that the action did not lie. "The servant," said the court, "is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

MELLORS v. SHAW.

[115.]

[L. J. 30 Q. B.]

This was an action by a miner against his masters, the proprietors of the mine. The sides of the shaft had been left in an unsafe condition, and in consequence some of the "bind" fell on the man's head and injured him severely. The plaintiff was ignorant of the danger under which he was working, but one of the defendants, being the superintendent of the mine, was of course aware of it. On these facts it was held that the action could be maintained.

It is not often that a servant can bring an action against his master in respect of an injury sustained in the course of the service. He is supposed at the time of entering on the service to have contemplated all the ordinary risks thereof, and to have made allowance for them in his wages. One of these risks which he is taken to have contemplated is the risk of one of his fellow servants engaged in a common employment negligently causing him an injury; and in such a case the master could not be successfully sued. Take, for instance, the case of a railway accident happening through the engine-driver's negligence: every ordinary passenger who has been injured can get compensation out of the company; but the guard and the stoker, no

matter how innocent of negligence, cannot ; they are fellow servants of the driver, and engaged in a common employment.

It is, however, a master's duty to take reasonable precautions to insure the safety of his servants. If he has omitted to provide competent fellow servants, or safe and efficient machinery, or if his own personal negligence, or that of one who may be regarded as a deputy-master, has conduced to the accident ;—in such cases he is not exempt from liability. Even, however, in cases where the machinery provided by the master was not safe and efficient, the master is not liable if the servant was equally well aware how defective it was, and in spite of that knowledge went on working with it. To such cases the principle *volenti non fit injuria* has application.

Murphy v. Smith,
19 C. B.,
N. S.

See *Woodley v. Met. Ry. Co.*,
2 Ex. Div.

3 Ex. Div.

It is not always easy to say whether two servants having the same master are in a common employment. The cases have gone rather far on the subject, and, if the Liberals ever come to their own again, legislation, with a view to giving a servant increased rights of action against his master, may be expected. The recent case of *Swainson v. North Eastern Railway Company* on this subject deserves attention. The action was brought by a widow under Lord Campbell's Act, the facts being as follows. At Leeds there are two stations close together, one belonging to the Great Northern Railway Company and the other to the North Eastern Railway Company. The deceased man Swainson was a signalman outside these stations. He was engaged and paid by the Great Northern Railway Company, and wore their uniform ; but his duty was to attend to North Eastern Railway trains as well as to those of his own company. He was negligently knocked down and killed by a North Eastern Railway train, and the question was whether he was a fellow servant with the persons in charge of that train. This question was decided in the negative, and the plaintiff was allowed to recover.

Degg v. Mid. Ry. Co., L. J.
26 Ex.

Wright v. L. & N. W. Ry. Co.,
L. J.
45 App.
L. J. 26
Ex.

1 B. & S.

It has been held that a person who volunteers to assist servants in their work, whatever it may happen to be, is a fellow servant of theirs for the purposes of an action against the master. But the case is different of a consignee of goods who helps the carrier's servants to unload. If he is hurt by their negligence, he may sue their master. "But then," said Cleasby, B., in the last case referred to, "it is said that here the negligence was that of the company's servants, and the plaintiff was in the position of a fellow servant. The person injured was in that position in *Degg v. Midland Railway Company* and *Potter v. Faulkner* ; for where a man having no business of his own to accomplish in the matter consents to assist the servants of the company in doing the company's work, with what other object can he be acting except that of acting for the occasion as a company's servant ? He is in the same position towards the employers as a fellow servant, for this reason, that it would be unjust that the fact

of entering voluntarily into the employ should impose a higher liability upon the employer than would exist towards a regularly employed fellow servant. But no such considerations apply to the present case. The plaintiff here was not a stranger, and his interference with the object of getting delivery of his heifer cannot be construed into an agreement to act as a servant of the company, and it is in that agreement that the law implies a consent to take the risks incidental to the service, including risk from the negligence of fellow servants."

Negligence.

THOMAS v. RHYMNEY RAILWAY CO.

[116.]

[L. R. 6 Q. B.]

Mr. Thomas was a railway passenger from Caerphilly to Cardiff. Midway between these two stations was Llandaff. From Caerphilly to Llandaff the line belonged to the Rhymney Railway Company, and from Llandaff to Cardiff to the Taff Vale Railway Company, the Llandaff station being also the exclusive property and under the exclusive control of the latter company. The Rhymney Railway Company, however, had running powers over the line from Llandaff to Cardiff, and issued through tickets for the whole journey from Caerphilly to Cardiff. It was one of these tickets that Mr. Thomas took; and his contract therefore was with the Rhymney Railway Company.

All went well till the episcopal city was reached; but at Llandaff station the station-master, a servant of the Taff Vale Company, was guilty of a gross piece of bungling. He allowed the train in which Mr. Thomas was travelling to leave the station only three minutes after an engine and tender of the Taff Vale Company, carrying no tail light, tho' the night was very dark, had started on the same line of rails. The consequence was that Mr. Thomas's train ran

into the engine and tender, and Mr. Thomas, with other passengers, was much hurt. The question was whether the Rhymney Company were responsible to the plaintiff for the negligence of the Taff Vale Company, and it was held that they *were*, for it was with them that the contract had been made.

In deciding *Thomas v. The Rhymney Railway Company* the judges 7 H. & N. followed a case of *Great Western Railway Company v. Blake*, holding that it made no difference as to the defendants' liability whether they ran over the other company's line by virtue of running powers conferred on them by *Act of Parliament* or by *arrangement*.

The principle is not confined to railway companies. A Mr. John—this was the gentleman's *surname*—wished to go by the defendant's steam-boat from Milford Haven to Liverpool. Passengers embarking with that object used first to go on board a hulk in the harbour belonging, not to the defendant, but to a Mr. Williams; and thence they would go on board the steamer. Through the negligence (presumably) of Mr. Williams, a certain hatchway on board this hulk was left unprotected, and Mr. John after taking his ticket fell down it. For this disaster the steam-boat proprietor was held responsible on the Blake and Rhymney principles, namely, that he must be taken to have warranted that no part of the road should be defective through negligence.

*John v.
Bacon,
L. R. 5
C. P.*

It is to be observed, however, that the contract of a company with the person to whom they have issued a ticket as to accidents happening through other people's negligence extends only to persons connected with carrying the passenger. They are not responsible for collateral operations. Two or three years ago, a gentleman took a ticket from the Midland Railway Company to be carried by them on their line from Leeds to Sheffield. The London and North Western Railway Company had running powers over a portion of the line, and through the driver, drunk or a fool, disobeying the Midland signals, one of their trains dashed into the Midland train and injured the traveller bound for Sheffield. He brought his action but was not successful, because, as he was informed, the judges "cannot connect with the management of the railway something which is the direct effect not of defective regulations of the company, not of any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use."

*Wright v.
Mid. Ry.
Co., L. R.
8 Ex.*

A railway company may protect itself by an unsigned condition from liability for the loss of goods beyond its own line, the

Railway and Canal Traffic Act only having reference to a company's own line. The chief authority for this is a case where a person, having taken a ticket from the South Eastern Railway Company to go from London to Paris, lost his portmanteau between Calais and Paris on the Great Northern of France Railway. In a very recent case it appeared that a Mr. Burke had taken from the South Eastern Railway Company a return ticket to Paris. On the ticket was a condition (which Mr. Burke never read or knew anything about) that the company would not be responsible for anything happening off their lines. Mr. Burke was injured on some French railway, which his ticket entitled him to travel over, and he went to law with the South Eastern Railway. But it was held that the condition, though they had not taken any sufficient steps to bring it to the plaintiff's notice, absolved them from responsibility.

Zunz v. S. E. R. Co.,
L. R.
4 Q. B.

As to when the injured traveller can sue the company that has been negligent, instead of the company that has given him a ticket, the very recent case of *Foulkes v. Metropolitan Railway Company* may be consulted.

Burke v. S. E. Ry. Co., 5 C. P. D.

Person Employing Contractor not Generally Responsible.

QUARMAN v. BURNETT.

[117.]

[6 M. & W.]

The defendants were a couple of elderly ladies residing in Moore Place, Lambeth. They kept a carriage of their own, but neither horses nor coachman. As the carriage, tho' a good one, would not go by itself, they were in the habit of hiring horses and coachman from a job-mistress named Mortlock. They generally had the same horses, and always the same coachman, a steady, respectable, elderly-ladylike sort of person named Kemp. They paid him 2s. a week, but he received regular wages from Miss Mortlock. The man had a regular Burnett livery, which he always put on when he drove the elderly ladies, and which used to hang up in their hall.

A day or two before Christmas Day, 1838, Kemp drove the Miss Burnetts out as usual, and after depositing them at their door went in himself to leave his livery. He knew the horses well, and trusted them to stand still while he was changing his coat. For once his confidence was misplaced. The horses got frightened at something, —could it have been a train?—and bolted, finally upsetting a quiet old gentleman and severely injuring him.

The question now was whether Kemp was the servant of the Miss Burnetts, so as to make them responsible for what had happened, on the principle *respondeat superior*. Counsel for the plaintiff made great capital out of the livery, the weekly payments, and such circumstances tending to show that the defendants were the *dominæ pro tempore*; but in the end it was held that they were not liable (a).

[118.]

**REEDIE v. LONDON & NORTH WESTERN
RAILWAY CO.**

[4 EXCH.]

About thirty years ago the London and North Western Railway Company, being engaged in constructing a line between Leeds and Dewsbury, agreed with some contractors named Crawshaw that the latter should make two miles of it in a particular part. By the terms of this agreement the company were to have a general right of superintending the progress of the work, and, if the contractors employed incompetent workmen, the power to dismiss them. This being the agreement between the company and the contractors, it happened that Mr. Reddie

(a) The same point had been previously (in *Laugher v. Pointer*, 5 B. & C.) fully discussed, but, through an equal division, left undecided.

was one day taking a quiet stroll along the Gomersall and Dewsbury turnpike road, and was just passing under one of the company's viaducts in the part of the line which was being done for them by Messrs. Crawshaw and Co., when by the carelessness of one of the contractors' workmen a big stone fell from above and crushed him into a jelly.

This action was brought by the widow under Lord Campbell's Act, but she was unsuccessful, as the workman whose negligence had caused Mr. Reedie's death was considered not to be a servant of the railway company, notwithstanding their power to dismiss him for incompetence.

To make one person responsible for the negligence of another it must be shown that the relation of master and servant subsisted between them. "I apprehend it to be a clear rule," said Willes, J., in 1870, "in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable."

A contractor exercising an independent employment is not the servant of the person who engages his services, and does not make such person liable for any torts he may commit. Nor, again, is a sub-contractor the servant of the contractor who has employed him. A railway company entered into a contract with A. to make part of their line: A. contracted with B. to build a bridge in that part of the line: and B. in his turn contracted with C. to erect a scaffold, which was necessary for the building of the bridge. Through the negligence of C.'s workmen somebody tumbled against the scaffold, and by and by brought an action against B., the builder of the bridge, for personal injuries. But it was held that he ought to have sued C., if anybody.

Murray v. Currie, L. R. 6 C. P.

Milligan v. Wedge, 12 Ad. & E.

There are, however, some exceptional cases in which a person employing a contractor is liable for the contractor's wrongful acts:—

Knight v. Fox, 5 Exch.

1. *Where the employer personally interferes.*

The proprietor of some newly built houses had his attention drawn by a policeman to the fact that a contractor he had employed to make a drain had left a heap of gravel by the road side. The proprietor said he would get it removed as soon as possible, and paid a navvy to cart it away. The navvy did not do his work thoroughly

enough, and a person driving home was upset and injured. In an action by this person against the proprietor, *Quarman v. Burnett* was cited for the defence and it was urged that it was the contractor who was liable. But the proprietor was held liable, on the ground that it did not appear that the contractor had undertaken to remove the gravel, and the proprietor had busied himself about it.

Burgess
v. Gray,
1 C. B.

2. *Where the thing contracted to be done is unlawful.*

A company, without the special powers for that purpose which they ought to have had, employed a contractor to open trenches in the streets of Sheffield. The plaintiff walking down the street fell over a heap of stones left there by the contractor, and broke her arm. She succeeded in getting damages out of the company, the distinction being clearly drawn between a contractor being employed to do something lawful and to do something unlawful.

Ellis v.
Sheffield
Gas Con-
sumers' Co.,
23 L. J.
Q. B.

3. *Where the thing contracted to be done is perfectly lawful in itself, but injurious consequences must in the natural course of things arise, unless effectual means to prevent them are adopted.*

Bower v.
Peate,
1 Q. B. D.

4. *Where the employer is bound by statute to do a thing efficiently.*

A railway company were authorised by Act of Parliament to make an opening bridge over a navigable river. They employed a contractor, and that gentleman ingeniously made them a bridge which wouldn't open. The plaintiff's vessel was in consequence prevented from navigating the river, and the company were held responsible to him.

Hole v.
Sitting-
bourne Ry.
Co., 6 H.
& N.

Responsibility of Master for Torts of Servant.

[119.]

LIMPUS v. LONDON GENERAL OMNIBUS CO.

[32 L. J.]

"During the journey," say the regulations of the London General Omnibus Company, "he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list. *He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business, whether such omnibus be one belonging to the company or otherwise.*" In defiance of this excellent rule one of the

company's drivers, between Sloane Street and South Kensington, obstructed and upset a rival bus belonging to the plaintiff. In an action for the damage so done it was urged for the defendants that the driver was acting contrary to his orders, and therefore outside the scope of his employment. This contention, however, was not successful, for it was held that, tho' the driver had acted recklessly and improperly and in flat disobedience to his express orders, he had acted, as he thought, for the good of his employers, and sufficiently in the course of his employment to make them liable.

**POULTON v. LONDON & SOUTH WESTERN
RAILWAY CO.**

[120.]

[L. R. 2 Q. B.]

Mr. Poulton, a horse dealer, took a horse to the Salisbury Agricultural Show, and, after winning any number of prizes, returned with it to Romsey. When he arrived at his destination he gave up a ticket for himself, and a certificate for his horse. This, however, did not satisfy the station-master, who called upon him to pay 6s. 10d. for the carriage of the horse, under a mistaken notion that it could not be carried free by that train. Poulton refused to pay this sum, and was consequently arrested by a couple of policemen acting under the station-master's orders, and detained in custody till it was found by telegraphing that Poulton was right and the station-master wrong.

The injured horse-dealer now brought an action against the railway company for false imprisonment, but was bowled over on a point of law. They successfully answered his claim by saying that, as they themselves would have had no right to apprehend the plaintiff for not paying

his horse's fare, so their servant the station-master could have had no implied authority from them to do what he did.

In order that a master may be responsible for a tort committed by the servant, the latter must have been acting in the course of his regular employment. If while driving me, or driving on my business, my servant negligently injures a person, I am clearly liable. So am I even if the accident occurs while the servant is *temporarily deviating* for a purpose of his own. A contractor gave strict orders to his workmen that they were not to leave their horses, or to go home during the dinner hour. One of them, however, had the temerity to disobey these orders. He went home to his dinner a quarter of a mile off, and left his cart and horse standing unattended outside. They ran away and injured the plaintiff's railings. The man's master was held responsible on the ground that the workman was acting within the general scope of his authority to conduct the horse and cart during the day.

Whatman
v. Pearson,
L. R.
3 C. P.

But if the enterprise is entirely the servant's,—if, for instance, he takes his master's carriage without leave for purposes entirely his own,—the master is not responsible. One May Saturday in 1869 a city wine-merchant sent a clerk and carman with a horse and cart to deliver wine at Blackheath, and to bring back a quantity of empty bottles to the offices, which were in the Minories. On the homeward journey, after crossing London Bridge, they should have turned to the right; instead of that they turned to the left, and went in the opposite direction on some private matter of the clerk's. While thus going quite against their orders they ran over a child. It was held that the city wine-merchant was not responsible. It is obvious, however, that these two cases run somewhat fine.

Storey v.
Ashton,
L. R.
4 Q. B.

The point, of course, is often taken for the defence in this class of cases, that the person causing the mischief was not the defendant's servant so as to make him liable. On this subject the student should

2 Q. B. D.

3 C. P. D.

refer to the recent cases of *Venables v. Smith* and *Steel v. Lester*. In the former case it was held that the proprietor of a cab was responsible to the plaintiff for a drunken driver's knocking him down. Strictly, the relation between the proprietor and the driver is that of bailor and bailee, but the effect of the Acts of Parliament regulating cabs is, in the interests of the public, to render the proprietor responsible for the torts of the driver. In *Steel v. Lester* the action was brought by the owner of a wharf at Spalding for injury done to his wharf by a sloop which, through the negligence of her master, a man named Lilee, had broken loose from her moorings. The sloop really belonged to Lester, and he was registered as the owner; but Lilee did not merely act as his hired servant: there was an agreement between

them by which Lilee not only had complete control over the vessel, but pocketed two-thirds of the net profits. In spite of this agreement, it was held that Mr. Lester must pay for the mending of Mr. Steel's wharf. In *Lucas v. Mason*, decided rather earlier than the two cases just referred to, the action was by a man who had been turned out of a Church Liberation Association meeting in Lancashire against the chairman, who had said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." It was held that there was not the ordinary relation of master and servant here, and that the chairman was not responsible. L. R. 10
Ex.

A man is not answerable for the tortious acts of his servant whom he has lent to another, committed while in the service of that other. This was lately held in a case in which some colliery proprietors had agreed with a Mr. Roger Whittle that he should do some sinking and excavating for them, and that they should place certain of their servants under his entire control. One of these servants, an engineer named Lawrence, fell asleep when he ought to have been particularly wide awake. It was held that the plaintiff, who had suffered injury in consequence, could not maintain an action against the colliery proprietors, because, tho' the engineer remained their general servant, yet he was acting as Whittle's servant at the time of the accident.

A master is never responsible for the wilful and malicious act of his servant, even while acting in his employment. If, for example, a driver were to lose his temper, and, out of angry feeling, were to drive his master's carriage against another carriage, and so bring about an accident, the master would not be responsible. As Lord Kenyon said in a well-known case on the subject, "When a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be responsible for such act." Rourke v.
White Moss
Colliery
Co., 2 C.
P. D.

It is scarcely necessary to say that a master is not responsible *criminally* for the acts of his servants. In a very recent case it was attempted to make a newspaper proprietor criminally responsible for a libel which his editor had inserted without his employer's knowledge or authority. But the attempt failed, as it deserved to. "I think," said Lush, J., "the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved; and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorise him to do it in a lawful and not in an unlawful manner. This is the doctrine which is applied to other cases of wrongs done by servants when it is sought to fix with criminal liability the employer, and the statute intended to place libel on the same footing" Macmanus
v. Cricket,
1 East.
Reg. v.
Holbrook,
4 Q. B. D.

as other torts . . . Altho' the employer is liable civilly for such a wrong, this is not upon the presumption of authority but by virtue of the maxim '*respondeat superior*,' which on grounds of policy and general convenience puts the master in the same position as if he had done the wrong himself, a maxim which, as I before observed, pertains to civil and not, except in rare instances, to criminal liability."

3 E. & E. The cases of *Goff v. Great Northern Railway Company* and *Bayley*
 L. R. 7 C v. *Manchester, Sheffield & Lincolnshire Railway Company* (in both
 P. See which cases innocent passengers were roughly handled by over-
 also *Seymour v.* vigilant railway servants), and the very recent case of *Bank of New*
Greenwood, South Wales v. Owston (where it was held that the arrest and prose-
 7 H. & N. cution of offenders is not within the ordinary scope of a bank-
 L. R., App. manager's authority) may with advantage be consulted by the
 Cases, student on this subject.
 June 1879.

Ruinous Premises.

[121.]

TODD v. FLIGHT.

[9 C. B. N. S.]

The late lamented Mr. Flight,—the memory of the litigious is blessed,—bought a shaky old house next door to the plaintiff's chapel, and let it to a tenant. By and by, of course, the house tumbled down on the chapel, and did it the mischief in respect of which this action was brought. Mr. Flight's answer to the claim was—"The occupier, my tenant, is responsible; not I, the innocent reversioner." But it was held that, as Flight had let the house when he knew the chimneys to be in a very dangerous condition, and as the building had fallen by the laws of nature and not through the default of the tenant, it was he who must pay.

Among the perils and dangers of life, a London street is none of the least. Not only is the wayfarer exposed to the unprovoked attacks of devious drivers and of elderly gentlemen who flourish their umbrellas, but he is constantly trusting himself to iron gratings

and glass coverings which may or may not give way and precipitate him down some unfathomed abyss from which he will be fortunate if he emerge a shattered cripple and excited litigant. Reader, since this may be thy fate, consider whether thou wouldst more wisely bring thine action against him that occupieth or against him that hath the fee.

The general rule is that the occupier, and not his landlord, is responsible for any injury arising to a third person through the premises being out of repair. And it does not much matter how careful he has been, if he has not succeeded in making his premises safe. A year or two ago a good old woman was toddling down the Strand one afternoon when a large lamp which was suspended from the front of a house, and projected several feet across the pavement, fell upon her, and injured her severely. The occupier of the house was tenant under a lease, and a short time before had noticed that the lamp was getting out of repair, and had employed a competent contractor to put it right. He thought, therefore, that he had done as much as could be expected of him. He thought wrong. "The question is," said Lush, J., "What is the duty of an occupier who has a lamp in the position of that of the defendant? Is it his duty absolutely to maintain that lamp in proper repair, or to employ a competent person to repair it? I apprehend that the wider duty is incumbent on the occupier." And so they all apprehended, and the plaintiff got £40.

Where, however, the lessor is really more to blame than the lessee for the condition of the premises, then it is different, and the action must be brought against him. *Todd v. Flight* illustrates this. The premises were in a shameful condition, and Flight ought not to have let them without making them safe. So too, if, by the terms of the lease, the landlord is to do the repairs, the action must be against him. In one of the most recent cases on the subject, where an insufficiently fastened chimney-pot had been dislodged by a high wind, and tumbled on a pot-man's head, the court said,—“We think there are only two ways in which landlords or owners can be made liable in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *primâ facie* liable,—first, in the case of a contract by the landlord to do the repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance where he lets premises in a ruinous condition.”

A couple of coal-shoot cases often referred to (in both of which the landlord was held not liable) are *Pretty v. Bickmore* and *Gwinnell v. Eamer*.

Tarry v. Ashton,
1 Q. B.
Div.

*Nelson v. Liverpool
Brewery
Co.*, 2 C.
P. D.

L. R. 8
C. P.
L. R. 10
C. P.

Damage from Sparks of Railway Engines.

[122.]

VAUGHAN v. TAFF VALE RAILWAY CO.

[5 H. & N.]

A quarter of a century ago Mr. Vaughan was the proprietor of a plantation adjoining the embankment of the Taff Vale Railway Company. The grass growing in the plantation was of a very combustible nature, and so were some dry branches. In fact the whole was graphically described by the plaintiff himself as being "in just about as safe a state as an open barrel of gunpowder would be in the Cyfarttfa Rolling-mill." One day this susceptible plantation was discovered to be on fire, and eight acres of it were burnt. It was not disputed that it had taken fire from a spark from one of the defendants' engines, but they contended, and it was decided, that they were not responsible, as they were authorised to use such engines, and had adopted every precaution that science could suggest to prevent injury.

*Jones v.
Festiniog
Ry. Co.,
L. R. 3
Q. B.*

*Fremantle
v. L. & N.
W. Ry. Co.,
10 C. B.,
N. S.
L. R. 6
C. P.*

If, however, a company is not authorised by statute to run locomotive engines, and yet do so, they are liable for injuries resulting, tho' negligence is expressly negatived. On the other hand, if a company has been guilty of negligence—indeed, if they have not adopted the latest appliances to prevent danger—they will be liable altho' authorised by statute. An important case, decided about ten years ago, is *Smith v. London & South Western Railway Company*. In the middle of a hot summer some workmen of the company, who had been cutting the grass and trimming the hedges by the side of the line, left the trimmings and stuff lying about in heaps instead of carting them all away. After the heaps had been there a fortnight, they were one fine day—presumably from the sparks of an engine of the company that had just gone by—discovered to be on fire. The fire was fanned by a high wind, and finally burnt down the cottage of Mr. Smith, two hundred yards off. It was held that the defendants, tho' their engines were of the best possible construction, were responsible for the damage thus done.

The law was formerly much stricter about the safe keeping of fire than it is now. A man was responsible for an *accidental* fire which broke out on his premises and burnt his neighbour's house. And in days when houses were mostly made of wood it was quite right to be strict. But by 14 Geo. III. c. 78 (the Building Act) it was provided that "no action should lie against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire should . . . *accidentally* begin." A case of some celebrity on Sect. 86. the subject is *Vaughan v. Menlove*. A farmer in Shropshire had 3 Bing., a hayrick in a highly dangerous condition. It smoked, and steamed, N. C. and showed unmistakable signs of being about to take fire. To the advice and remonstrances of his neighbours, who pointed out its condition, all the answer the farmer vouchsafed was, "Oh, nonsense! I'll chance it." Finally, indeed, he did take a kind of precaution: he made a chimney through the rick; which, tho' done with good intentions, was scarcely wise. The rick took fire, and burnt the plaintiff's cottages in the next field. For this damage the farmer was held responsible. "The care taken by a prudent man," said Tindal, C. J., "has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question."

Support from Neighbouring Land.

SMITH v. THACKERAH.

[123.]

[L. R. 1 C. P.]

This was a battle between a well and a wall, in which the wall came off second best. Mr. Smith having built a wall close to the edge of his land, his neighbour, Mr. Thackerah, proceeded to dig a well on his own land, but within a few feet of the wall. This was all very well, but the consequence was, down went Smith's wall. Smith now went to law for the injury done to his wall, but, *as it appeared that, if there had been no building on Smith's land, he would have suffered no appreciable damage by*

Thackerah's proceedings, it was held that he had no right of action.

Every man must so use his own property as not to injure his neighbour's. In virtue of this principle an owner of land is entitled to require that his neighbour, whether he be the owner of the subjacent soil or of the adjacent land, shall not so treat it as to deprive him of due support. This right, however, exists only in favour of land unweighted by buildings, that is to say, of land in its natural state. The most obvious common sense dictates that a person has no business to load his own soil with buildings in such a way as to make it require the support of his neighbour's land. Such rights to support, however, may be acquired by grant or prescription. This grant may be implied. For example, when one man sells (another) part of his land for building purposes, he impliedly grants sufficient lateral support from his adjacent land for such buildings. He would not be allowed, for instance, to work mines dangerously near to them. And, even if there is no such easement by grant or prescription, yet, if the damage done to the dominant land is so considerable as to be actionable, damages may be recovered for injury sustained by recently erected buildings. "The moment the jury found," said Pollock, C.B., in *Brown v. Robins*, "that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is as if a mere model stood there, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it." Thus, if in *Smith v. Thackerah*, it had appeared that Smith's land in its natural state would have suffered appreciable damage by Thackerah's well, Smith would have been entitled to claim compensation for the injury occasioned to his wall.

Elliot v. N. E. Ry. Co., 10 H. L. C.; and *Siddons v. Short*, 2 C. P. D. *Brown v. Robins*, 4 H. & N.

Angus v. Dalton, 4 Q. B. D.

As to the support given by one house to another adjoining, the following remarks of Thesiger, L.J., in a recent case may be quoted: "The right to support of buildings from buildings is an easement of a highly artificial character, and one which must necessarily be of unfrequent occurrence. Properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses. No man can, therefore, from the mere existence in fact of this dependence, be presumed to have notice of it, and as a consequence be presumed, in the event of his not interrupting it, to acquiesce in his neighbour's enjoyment of it. Such enjoyment offends against one of the cardinal rules governing the acquisition of an easement, namely, that the user must not be secret. But altho' the general rule be as I have stated, still, so far as there is authority upon this point at all, it would appear to have been the

opinion of the courts that the easement in question might, under special circumstances, be acquired." *Primâ facie*, no doubt, I cannot compel my neighbour to keep his house standing and in repair. All he is bound to do is to prevent its falling on my house and injuring my property. But a right to support of the kind may be gained by grant, express or implied. Where, for instance, two houses are built by the same man, and depending on one another's support, there remains a mutual right to support after they have passed into the hands of different owners. And after an enjoyment of support for twenty years there arises a presumption, which, however, can be rebutted, that the enjoyment was of right.

*Chauntler
v. Robin-
son*, 4
Exch.

*Richards
v. Rose*,
9 Exch.
*Angus v.
Dalton*,

It is to be observed that the right to support which a man may have in favour of his land or buildings is quite independent of the question of negligence. A man, of course, is always responsible to his neighbour for carrying out works on his own land in a negligent and improper way.

In the important case of *Bonomi v. Backhouse* the question arose as to the time at which an actionable injury arises, and in the end it was held that it dates, not from the time of the commencement of the wrong-doing—the digging, for instance—but from the time of the plaintiff's first sustaining actual injury; the effect of which is that he will not necessarily be barred by the Statute of Limitations from bringing his action seven or eight years after the defendant's commencing to do that which ultimately resulted in injury to the plaintiff.

In a recent case it has been held that in an action for injury to the plaintiff's land and buildings, by removal of lateral support through mining operations carried on next door, he may recover not merely for existing but for future damage.

*Lamb v.
Walker*,
3 Q. B. D.

Nuisances.

SOLTAU v. DE HELD.

[124.]

[2 SIM. N. S.]

The sound of the church-going bell is often a very pleasant one to hear at a distance. Quite so: but it is usually the distance to which the enchantment is to be

ascribed, and it may be questioned whether the bell-ringers themselves experience sensations of pleasure at the melodies they evoke. Thirty years ago Mr. Soltau was a steady-going family man, residing in a semi-detached house at Clapham. The adjoining house was, from 1817 to 1848, occupied as a private house, but in the latter year it was bought by a religious order of Roman Catholics, calling themselves "The Redemptionist Fathers," and those gentlemen converted the house into a chapel, and appointed de Held, a Roman Catholic priest, to officiate therein. One of the first acts of Mr. de Held, on entering on the scene of his ministrations, was to set up a harsh and discordant bell, and to ring it with pious unscrupulousness at the most unearthly and unnecessary times. As Soltau, speaking for himself and the neighbours generally, said plainly—"The practice we complain of is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when members of our household happen to be invalids; it tends also to depreciate the value of our dwelling-houses." This was a complaint emanating, not from the general body of Claphamites, who, being at a greater distance, were more or less indifferent to the matter, but from those who were the greatest sufferers, the immediate neighbours, and it was on this ground of special annoyance that Mr. Soltau was considered entitled to be heard.

What the law counts nuisances are divided into two classes,—public and private. A public nuisance is suppressed by indictment or information; it is the public that is supposed to be aggrieved by what the defendant has done, and individuals, as individuals, have nothing to do with it. To this, the rule, *Soltau v. de Held* offers an exception, viz., that when the public nuisance is particularly obnoxious to an individual, it is considered, as far as he is concerned, to be also a private nuisance, and he may bring an action or apply for an injunction in respect of it. To take a venerable illustration:—"If A. dig a trench across the highway, this is the subject

of an indictment ; but if B. fall into it, the particular damage thus sustained by him will support an action." The bell-ringing, in so far as it was a nuisance to all Clapham, was a public nuisance, and the proper way to put it down was by indictment or information ; but, in so far as it was a nuisance to Mr. Soltau personally, it was a private nuisance, and an action lay.

There is another important practical division of nuisances which requires a moment's attention, viz., into those which cause damage to *property*, and those which merely cause *personal* discomfort. When a nuisance causes substantial damage to a man's property, he can always get compensation for it ; but he must put up with a good deal—there must be a genuine interference with the comfort of human existence—before he can successfully go to law for an annoyance of the other kind. "My Lords," said Lord Westbury, in a case in which a copper smelting company's noxious gases had injured a man's cabbages and cattle, and depreciated his property generally, "in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

See *Tecson v. Moore*, 1 Ld. Raym., and *Winterbottom v. Derby*, L. R. 2 Ex.

St. Helen's Smelting Co. v. Tipping, 11 H. of L. Ca.

It is a good defence to an action for a nuisance to show that what the defendant has done was expressly authorised by statute ; and sometimes the defendant may claim an easement which entitles him to annoy the plaintiff. But it has lately been held that "user which is neither physically preventible by the owner of the servient tenement, nor actionable, cannot found an easement." In the case referred to, a confectioner in Wigmore Street had for more than twenty years used large mortars in his back kitchen for pounding loaf sugar and the like. A doctor lived next door, but till shortly before the action he had not been seriously annoyed by the pounding of the sugar, as the noise went over his garden and was rapidly dispersed. But he took it into his head to build a consulting room in the garden, and then he came in for the full benefit of the confectioner's pounding. Not only did the noise prevent him from examining his patients by auscultation for diseases of the chest, but he found it impossible to concentrate his attention on any subject that required thought. So he went to law ; and it was held that the confectioner had not acquired an easement either at common law or under the Prescription Act, and that the doctor was entitled to an injunction.

Sturges v. Bridgman, 41 L. T., N. S. 2 & 3 Will. IV. c. 71.

Seduction.

[125.]

TERRY v. HUTCHINSON.

[L. R. 3 Q. B.]

The plaintiff's daughter, a girl of nineteen, was in the service of a draper at Deal. For misconduct in connection with a concert, her master dismissed her at a day's notice, and she went home to the plaintiff's house at Canterbury. On the way, however, in a railway carriage, she was seduced by the defendant. The question was, whether there was sufficient evidence of service to maintain an action for seduction. It was held that there *was*, as the girl at the time of the seduction was on her way back to resume her former position as a member of her father's family. "The girl," said the court, "is under twenty-one, and is therefore *primâ facie* under the dominion of her natural

guardian; and as soon as a girl under age ceases to be under the control of a real master, and intends to return to her father's house, he has a right to her services, and therefore there was a constructive service in the present case."

The action for seduction is based upon a fiction. The plaintiff is supposed to be the *master* of the girl seduced, and to have lost the benefit of her *services* by what the defendant has done to her. It is not necessary, however, for the plaintiff to prove any express contract of service. If he is the father, and his child under age, service will be presumed; and if he is not the father, or the girl is not under age, service will, if she was living under his roof, be inferred from such slight acts of household duty as making tea or milking cows. On the other hand, if the plaintiff's daughter was, at the time of the seduction, in the service of another man—tho' that other were himself the seducer—no action would lie. This, of course, is monstrous, and there is another case equally so, viz., where the girl is in the service of one master at the time of the seduction, and of another at the time of the pregnancy and illness. The first master could not sue, because there was no illness and loss of service while she was with him; and the second could not, because the girl was not seduced while in his service. Altho' the action purports to be only an action for loss of services, that is not the scale on which the damages are calculated. "In point of form," said Lord Eldon, in a seduction case, "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to her child; in such case, I am of opinion that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children whose morals may be corrupted by her example."

Evans v. Walton,
L. R. 2
C. P.

Dean v. Peel,
5 East.

Davies v. Williams,
10 Q. B.;
and see
Hedges v. Tagg, L.R.
7 Exch.

Bedford v. McKowl,
3 Esp.

Action for Deceit.

PASLEY v. FREEMAN.

[126.]

[3 T. R. & S. L. C.]

Pasley was a person who dealt in that curious export of

Mexico, cochineal, and wanted a purchaser for a quantity he had on hand. Happening to make known his want to Freeman, that worthy instantly said he knew somebody who would buy the cochineal—a Mr. Falch. “Is he a respectable and substantial person?” asked Pasley. “Certainly he is,” answered Freeman, well knowing that he was nothing of the sort. On the faith of this representation Pasley let Falch have sixteen bags of cochineal, of the value of nearly £3000, on credit. It then turned out that Falch was a man of straw, and as Pasley had not the remotest prospect of getting the £3000 from him, he sued Freeman for “telling a lie,” and got his money that way.

The 4th section of the Statute of Frauds enacts, amongst other things, that a promise to answer for the debt, default, or miscarriage of one of your friends, must be in writing, or it shall not bind you. Why, then, was Freeman held liable? The answer is that, whereas the section refers exclusively to *contracts*, Pasley sued Freeman in *tort*; and the principle affirmed in the case is that “wherever deceit or falsehood is practised to the detriment of another the law will give redress.” *Pasley v. Freeman*, however, was substantially, if not in point of form, a violation of the Statute of Frauds, and it gave birth to a progeny of similar cases; till at length Lord Tenterden got an

9 Geo. IV.
c. 14, s. 6.

Act passed in the ninth year of George the Fourth's reign, which provided that no one who had eulogised another's “character, conduct, credit, ability,” &c., in order to induce people to trust him, should be liable to an action for false representation, unless his eulogy were in writing and signed by him. The point cannot be said to be quite settled, but it is probable that to represent a particular piece of property, on the security of which a person was thinking of lending money, to be sound and safe (*e.g.*, to say that a person's life-interest in certain trust-funds was charged only with three annuities), would be held to be precisely the same thing as representing the man himself to be solvent, for a man's “ability” consists in the things that he has.

Lyde v.
Barnard,
1 M. & W.

It was held in *Pasley v. Freeman* that it is no defence to an action of the kind that the defendant had no interest in, and was to gain nothing from, telling his lie.

The representation need not have been made directly to the plaintiff. It is enough that the defendant intended that the plaintiff should act upon it. If bank directors, for instance, circulate a false report formally addressed to their shareholders, but really intended

to catch unwary people with money to invest, a person who has thereby been inveigled into buying shares may sue for the loss he has sustained.

To support an action of deceit, the fraudulent purpose must be proved. Otherwise a man might sue his neighbour for having a conspicuous clock too slow, whereby the plaintiff missed his train, or for any mode of communicating erroneous information. But a man is answerable for reckless statements which he has made without much caring whether they are true or not, or without sufficient reason.

A certain amount of moral deceit, however, may be practised with impunity. A man sent to market a number of pigs, tho' he knew perfectly well that they had a contagious disease. He declined to give any warranty or representation of any kind. Buy them if you like; don't if you don't like. Thinking they were a nice-looking lot of pigs a person bought them, and, as the consequence, imported a whole cattle-plague into his homestead. It was held, however, in an action against the seller, that he had made no representation, and was not liable.

In such a case as this, however, the swindling vendor must take care what he is about; for, altho' he remained silent, he would nevertheless be liable if he had *concealed* a defect; as, for instance, where the vendor plastered over a defect in the wall of the house he was selling, and thereby entrapped the vendee into a bargain.

If the vendor has been guilty of fraud, the expression "with all faults" in the contract of sale will not protect him.

Scott v. Dixon,
29 L. J.
Ex., n.;
and see
Peck v. Gurney,
L. R. 6
H. L.,
Gerhard v. Bates,
2 E. & B.,
and
Richardson v. Silvester,
L. R. 9
Q. B.
Taylor v. Ashton, 11
M. & W.,
and see
Hart v. Swaine,
7 Ch. Div.
Ward v. Hobbs,
3 Q. B. D.
Pickering v. Dowson,
4 Taunt.
Schneider v. Heath,
3 Camp.

Trespass ab Initio.

VAUX v. NEWMAN.

[127.]

(Sometimes called *The Six Carpenters' Case*).

[8 REP. & S. L. C.]

It was on a warm September afternoon, in the early days of James I., that six thirsty carpenters entered a London tavern, "and did there buy and drink a quart of wine, and there paid for the same." Mark that, gentle reader; they *paid* for it. But a quart of wine does not go far with six lusty working-men; and the reader will

scarcely be surprised to hear that, like *Oliver Twist*, they asked for more. The waiter accordingly brought them "another quart of wine and a pennyworth of bread, amounting to 8*d.*" Whether the worthy publican acted on the principle that when men have well drunk they will be satisfied with any poison, or whatever the reason may have been, when the banquet was over and the reckoning came, our friends stoutly refused to pay. The question now was, whether this non-payment made their original entry into the tavern tortious; in other words, whether it made them *trespassers ab initio*:—

"The birds on the bough sing high and sing low,
What trespass shall be *ab initio*."

This question was decided in the negative, the judges holding that mere *non-feasance* is not enough to make a man trespasser *ab initio*. Two things, they added, must always concur to make a man trespasser *ab initio*:—1st, he must be guilty of *mis-feasance*; and 2ndly, the authority he abuses must be one given him by *the law* and not by an individual.

The authority these gentlemen abused was clearly one conferred on them by the law. The law gives every man a right to enter and take his ease in an inn, and if they had been guilty of *mis-feasance* (e.g., if they had broken mine host's glasses or his head) they would have been trespassers *ab initio*. But they were only guilty of *non-feasance*, viz., of declining to pay for their liquor. As instances of trespassers *ab initio* may be mentioned the lessor who enters to view waste *and stays all night*; the commoner who enters to view his cattle *and cuts down a tree*; and the man who enters a tavern *and continues there all night against the will of the landlord*. In such cases there is *mis-feasance*, and the authority is conferred by the law. The reason why *mis-feasance* does not make a man trespasser *ab initio* when the authority is conferred by an individual, would seem to be that those who voluntarily give powers can limit or recall them as they please, while the abuse of powers given by the law needs a more stringent protection.

A landlord's power to distrain on a tenant who will not pay his rent is an authority given him *by the law*. It follows, as a corollary,

that *mis-feasance* in distraining makes a landlord trespasser *ab initio*. And effect was once given to this corollary. If a landlord perpetrated a single irregularity it vitiated the whole proceedings. This was considered hard on landlords, and Parliament interposed. As the law stands at present, a landlord, who is really owed rent, is not to be considered a trespasser *ab initio* merely for the sake of an irregularity. But he will still be considered a trespasser *ab initio* if he distrains in an unauthorised way as distinguished from merely being irregular. To illustrate this distinction, if he were to distrain on his tenants during burglars' hours, he would become a trespasser *ab initio*, for a distress must be made between sunrise and sunset; but if he were to sell his tenant's goods without appraising them, he would be guilty merely of an irregularity, and it would be necessary for the tenant to prove special damage. So again, breaking open an outer door would make the landlord a trespasser *ab initio*, but making use of articles distrained, at all events if they would be none the worse for the user, would not.

A landlord may be trespasser *ab initio* as to part of the thing he distrains on, and not as to the rest. So it was held in a case in which a landlord had distrained a quantity of barrels of beer, and only helped himself out of one barrel.

It has been held that if an entry is so made as to amount to trespass *ab initio*, the damages which the injured tenant can recover are the whole value of the goods taken. The defendant cannot set off against it any sum that may have been due to him for rent, for the plaintiff can claim to be placed in precisely the same position he was in before the trespass.

S. L. C., in connection with the leading case, invites the student's attention to the famous case of *Taylor v. Cole*, a dispute about the King's Opera House, in which R. B. Sheridan was involved, where it was held that in a count for trespass by entering the plaintiff's house, and expelling him therefrom, a plea justifying the entry is sufficient, and the expulsion is mere matter of aggravation. As against a trespasser the owner of land is justified in making a forcible entry upon his land, tho' he is liable to be indicted at the suit of the public.

11 Geo. II.
c. 19, s. 19.

Dod v.
Monger,
6 Mod., and
see *Harvey*
v. Pocock,
11 M. & W.

Attack v.
Bramwell,
3 B. & S.
3 T. R.

Newton v.
Harland,
1 M. & G.,
and
Harvey v.
Bridges,
1 Exch.

Actions against Sheriffs, &c.

[128.]

SEMAYNE v. GRESHAM.*(Sometimes called Semayne's Case.)*

[5 COKE & S. L. C.]

Berisford and Gresham were two gay young sparks of the sixteenth century. They were great chums, and lived together in a house of which they were joint tenants in the fashionable and salubrious suburb of Blackfriars. Berisford, as is the manner of gilded youth, plunged deeply into debt, and one of the largest and most pressing of his creditors was a gentleman who may or may not have been his tailor, a Mr. Semayne, to whom he "acknowledged a recognisance in the nature of a statute staple";—a ceremony which, I presume, would be pretty much like a Berisford of our day giving an I. O. U., or otherwise committing himself on paper. In these impecunious circumstances, he was lucky enough to die, and, by right of survivorship, the ownership of the house in Blackfriars became vested in the bereaved Gresham. Now, in that house were "divers goods" of the late Mr. Berisford, and to these, in virtue of the little formality of the statute staple, Semayne not unreasonably considered himself entitled. Accordingly, he gave instructions to the sheriffs of London to go and do the best they could for him, and those functionaries, armed with the proper writ, set off for Blackfriars. But, when they came to the house, Gresham, who had an inkling of what they had come for, shut the door in their faces, "whereby they could not come and extend the said goods." It was for thus "disturbing the execution," and causing him to lose the benefit of his writ, that Semayne brought this action. Much, however, to his surprise and disgust,

he did not succeed, for the judges said Gresham had done nothing wrong in locking the front door, and that, even when the king is a party, the householder must be requested to open the door before the sheriff can break his way in.

Semayne's case is the chief authority for the popular legal maxim, which says that every Englishman's house is his castle—*domus sua est cuique tutissimum refugium*—a maxim which, in the lawless times from which our common law comes, was of the utmost importance, for what the law cannot do in that it is weak, a man must do for himself. The sanctity of home and hearth must be maintained at any cost. Happily, however, through the march of civilisation, the maxim has lost nearly all its old importance, and an Englishman's house is his castle for very few purposes indeed. An Englishman's house is *not* his castle *when the king is a party*, which he is whenever the Englishman is "wanted" for a felony or misdemeanour. But even then, before the outer door is broken open, the caller ought to ask to be allowed to enter quietly. An Englishman's house is *not* his castle *when the outer door is open*. The sheriff, having gained admission into the house, may break open as many inner doors as he pleases.

An Englishman's house is *not* his castle *when some adventurous Tittlebat Titmouse has got the better of him in an action of ejectment*. In this case, of course, it has ceased to be his house, and if he won't go, he must be made to.

An Englishman's house is *not* his castle *for anyone except himself and his family*. He may not shelter therein a person who flies thither for the purpose of evading the law. If, however, the sheriff gets inside only to find that the man he is in search of is not there, nor his goods either, he is not only a blunderer but a trespasser, and the injured Englishman can bring an action against him.

Finally, the maxim that "every Englishman's, &c.," refers only to his dwelling-house. Except, indeed, in the case of distress for rent, the outer doors of barns and outhouses detached from the dwelling-house may be broken open with impunity. The distinction in this last case has been stated to be "between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes." Another distinction between a landlord and a sheriff is that the former cannot distrain at all hours, while the latter can.

On the point, what degree of violence constitutes a breaking of the outer door, the cases are not altogether reconcileable. It is said by some authorities that it is a trespass for the sheriff merely to open the door in a gentle and ordinary manner, but it is doubtful if the

Hutchinson v. Birch,
4 Taunt.

Cooke v. Birt,
5 Taunt.
Brown v. Glenn,
16 Q. B.

law is really so severe on him as that. It has been held, however, that a landlord levying a distress is not justified in opening a window fastened by a hasp, or in gaining access to the premises by getting over a high wall.

Hancock v. Austin,
14 C. B.,
N. S.

Scott v. Buckley,
16 L. T.,
N. S.

It was held in the leading case that altho' the sheriff is a trespasser, yet the execution may be good. And this is still so, only that the court may, if it pleases, in the exercise of its summary jurisdiction, set the execution aside.

Trover, &c.

[129.]

ARMORY *v.* DELAMIRIE.

[1 STR. & S. L. C.]

A youthful chimney-sweeper was fortunate enough to find a very valuable jewel. You or I, had we found such a treasure, might have taken it to the nearest police station. Not so our young friend. By his lights finding was keeping, and he took it to a jeweller's to ascertain its value. The jeweller, taking advantage of the boy's simplicity, told him it was a rubbishy thing, and offered him three halfpence for it,—a munificent offer which the lad declined without thanks, and demanded his prize back.

“For all his words they gave him for the nones
The socket empty and withouten stones,
And laugh upon him and gan call him thief:
Therefore full wisely telleth he his grief
To men of law, which answered him anon.”

And what the men of law answered him anon was to this effect:—“You have fairly found this jewel, and nobody except the real owner has a better title to it than yourself; till he shall appear, you may keep it against all the world, and maintain trover for it.”

There is no truth whatever in the vulgar aphorism of schoolboys and the lower classes that finding is keeping. The duty of the

finder of a jewel, or other valuable article, is to discover, if he can, the person who has lost it; and if he keeps it, when he knows pretty well who that person is, he is guilty of larceny, and no one more richly deserves twelve months' imprisonment with hard labour (a).

The chief point on which *Armory v. Delamirie* is an authority is as to what is sufficient to enable a person to maintain an action of trover. It is not merely the person in whom resides the right of property who can maintain such an action. Armory had not that right. It was all along in the person who had lost the jewel. All Armory had was the right of possession; but it was considered that that was quite a sufficient foundation for an action of trover as against a mere wrong-doer. On the same principle (viz., that mere possession is sufficient as against a wrong-doer) rests a well-known rule in actions of ejectment, namely, that the plaintiff must recover by the strength of his own title, and not by the weakness of his opponent's. Possession, as the popular adage has it, is nine-tenths of the law.

A man in Bedfordshire enclosed some waste land, and died without having had it for twenty years. It was held that the heir of his devisee could maintain ejectment against a person who had entered upon it without any title.

It is on the same principle that the rule in pleading that a command can be denied rests. The position the person so pleading takes up is this: "Granted that the person you profess to represent has better right than I have, yet *you don't represent him*; he never told you, for instance, to come and take my cattle. I may not have a right against all the world, but I have a right against you."

So a defendant in possession may set up a *jus tertii*—that is, the right of a third person—to the lands, to disprove the claimant's alleged right.

Armory v. Delamirie also illustrates an important maxim of the law,—*omnia presumuntur contra spoliatorem*; that is to say, every presumption shall be made to the disadvantage of a wrong-doer. Delamirie refused to produce the stone when he gave back the socket, so it was presumed as against him to be the best kind of stone that would fit the socket. So, if a man withholds an agreement under which he is chargeable, it is presumed as against him to have been properly stamped. A person once claimed a debt from another, the proof of which was to be found in certain documents which were sealed up and in his keeping. Without having any business to do so, he broke the seal and opened the bundle of documents. The court did not in the least doubt that all the papers were before it,

Asher v. Whitlock,
L. R. 1
Q. B.

Chambers v. Donaldson,
11 East;
and *Dobree v. Napier*,
2 Bing.,
N. C.

Carter v. Bernard,
13 Q. B.

Crisp v. Anderson,
1 Stark.

(a) If, however, at the time of finding he intends to restore it to the owner, his afterwards altering his mind and determining to keep it will not make him (legally) guilty of larceny. *Preston's Case*, 2 Den.

Mortimer
v. Cradock,
 12 L. J.,
 C. P.

and did not doubt the justice of the claim, but the creditor's whole demand was disallowed *in odium spoliatoris*. So where a diamond necklace was missed, and part of it traced to the defendant, who could give no satisfactory account of how it came into his possession, it was held that the whole necklace might be presumed to have come into his hands so that he must pay the full value.

A third point was decided in the leading case, viz., that "a master is answerable for the loss of a customer's property intrusted to his servant in the course of his business as a tradesman." The responsibility of a master for the torts of his servant will be found treated of in this volume under the leading case, *Limpus v. General Omnibus Co.*, p. 202.

Conversion.

[130.]

HILBERY *v.* HATTON.

[2 H. & C.]

Mr. Hilbery, a Liverpool merchant, was the owner of the ship *John Brooks*, which in 1862 was chartered to take a cargo to Africa. The ship arrived off the coast of Africa, but unfortunately managed to get stranded there. A person named Ward, the consignee of the cargo, took possession of the vessel and without any authority had her put up for sale. One Thompson, the agent of the defendants, some English merchants, finding her going cheaply, bought the ship for his principals without knowing that Ward had no business to sell her. The defendants on being apprised by Thompson of what he had done wrote back to him—"You do not say from whom you bought her, nor whether you have the register with her. You had better for the present make a hulk of her." In an action by Hilbery it was held that there was evidence of a conversion by authority of the defendants, in spite of their having acted with as much circumspection as men well can act with.

This case is selected as illustrating the severity with which the law views the intermeddling with another man's property. The recent case of *Kirk v. Gregory*, where the defendant had removed some jewellery from the room of a dying man under the reasonable fear of its being stolen, may also be referred to. 1 Ex. Div.

Hiort v. Bott too is a good illustrative case. An ingenious scoundrel, named Grimmett, persuaded the defendant to indorse to him a delivery order for some barley, which he said had been sent to the defendant by mistake. In spite of his good intentions, which were simply to correct what he believed to be an error, the defendant was held liable. L. R. 9 Exch.; and see for other consequences of Mr. Grimmett's frauds *Hiort v. L. & N. W. Ry. Co.*, 40 L. T., N. S. *Stephens v. Etwall*, 4 M. & S.

Every one who takes part in the wrongful conversion of another man's property is responsible, even tho' he is only a servant obeying his master's orders. "The only question is," said Lord Ellenborough in the case last referred to, "whether this is a conversion in the clerk which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case." About a couple of years ago the owner of some cabs let them to a Mr. Peggs, cab-master, under a certain agreement. Mr. Peggs fraudulently got the defendant, an auctioneer, to sell them by auction. Tho' the auctioneer had thought all the time that the cabs belonged to Peggs, and had acted in a straightforward and correct manner, he was held liable in conversion to the true owner. *Cochrane v. Rymill*, 40 L. T., N. S.; and see *Hollins v. Fowler*, L. R. 7 H. L. C. "The defendant," said the court, "had possession of these goods; he advertised them for sale; he sold them, and transferred the property in them, and, therefore, from beginning to end he had control over the property; and unless we are prepared to hold contrary to all the definitions of conversion which have been laid down, we must hold that such acts amount to conversion."

Privileged Communications.

HARRISON v. BUSH.

[131.]

[5 E. & B.]

At Frome, in Somersetshire, there was a contested election, with the usual allowance of excitement and party

feeling. After it was over, Mr. Bush, an elector of Frome, wrote a letter to Lord Palmerston, who was then one of the Secretaries of State, complaining of the conduct of one of the local magistrates during the election, and saying that he had been stirring up and encouraging sedition, instead of putting it down with a strong hand. The magistrate brought this action for libel, but, as Mr. Bush had written his letter with the best intentions and in the discharge of what he considered to be a public duty, he was not successful.

A man must always discharge his duty to society and the public, notwithstanding that it may involve the employment of harsh language concerning his neighbours; and therefore such language is privileged.

The privilege may be absolute or conditional.

Speeches in the House of Commons, or in a law court, are absolutely privileged; so, too, are the statements of witnesses (at all events if relevant), and the fair and impartial reports of newspapers. A year or two ago, an expert in handwriting was asked in cross-examination whether he had not given evidence in a particular case named to him. The witness knew that the suggestion was that he had been grossly mistaken in that case, and, in spite of the magistrate's attempt to restrain him, blurted out, "I believe that will to be a rank forgery, and shall believe so to the day of my death." It was held in an action for slander that these words, having been spoken by the defendant as a witness, and having reference to the enquiry before the magistrate, his credit as a witness having been impugned, were absolutely privileged. In a still later case, three persons had applied in open court to a London police magistrate under the Master and Workman's Act for a summons against the plaintiff for wages. The magistrate said they must go to the county court, and declined to entertain the application. A report of these proceedings appeared in the newspapers the next day, and the plaintiff brought an action for it. It was held, however, that, as the report was a perfectly fair one, it was privileged.

Seaman v. Netherclift, 2 C. P. D.;
see also *Dawkins v. Rokeby*, L. R. 8 Q. B.
Usill v. Hales, 3 C. P. D.

Ordinary communications, however, are not privileged absolutely, but only *primâ facie*: and the rule is that, wherever one person having an interest to protect, or having a legal or moral duty to perform, makes a communication to another (such other having a corresponding interest or duty), this communication is *primâ facie* privileged. If, for example, a gentleman of shady character were to endeavour to get elected into a respectable club, a member who

knew something of his antecedents would be justified in making to the committee, or to another member, such a communication as would result in his being duly blackballed. So, too, a master who parts with a servant is justified in telling a person who, with a view to employing the man, enquires about his character, that he is, for example, a thief or a drunkard. Privilege, however, in these cases is not more than a presumption; and it is open to the plaintiff to give proof of "express malice," and show that the defendant's professed zeal for the public, and his desire to do his duty, are all pretence, and that he really has no other object than to injure the plaintiff.

Pattison v. Jones,
8 B. & C.

Privilege or not is a question for the judge, but, when it is attempted to rebut the presumption of privilege by proof of express malice, the question becomes one for the jury.

An interesting case on privileged communications has lately come before the Exchequer Division. It having been determined to restore Skirlaugh Church, an ancient Gothic edifice near Hull, the committee were thinking of putting the work in the hands of Botterill & Co., some Hull architects, when they received a memorial from the defendant, a clergyman, a resident in the neighbourhood, and a member of the Society for the Protection of Ancient Buildings and Monuments, recommending them not to do so, as Botterill & Co. were Wesleyans, and knew nothing about church architecture. It was considered that this letter of the æsthetic clergyman was not entitled to any particular privilege, and the architects were allowed to keep the verdict with substantial damages which the jury had given them.

Cooke v. Wildes,
5 E. & B.;
and see the
recent case
of *Clark v. Molyneux*,
3 Q. B. D.

It may be remarked that, even when a communication is privileged, it must be made temperately and judiciously. It is one thing, for instance, to make your communication in a sealed envelope, and another to make it unnecessarily by a telegram, which in the course of its transmission must of course be read and giggled over by a number of clerks. In a very recent case in Ireland it appeared that the defendants, some seed merchants, had applied to a customer for payment with a *post-card*, on which was written—

Botterill v. Whytehead,
Ex. Div., Dec.
6th, 1879.
Williamson v. Freer, L. R.
9 C. P.

"Sir,—Your plea of illness for not paying this trifle is mere moonshine. We will place the matter in our solicitor's hands if we have not stamps by return, if it costs us ten times the amount."

The customer brought an action for libel, and the seed merchants set up the defence of privileged communication; but the court, following *Williamson v. Freer*, held that the defendants, tho' the communication might be *prima facie* privileged, had gone beyond their rights in making it by *post-card*.

Robinson v. Jones,
L. R. I. 4
Ex. Div.

Torts which are also Crimes.

[132.]

WELLOCK v. CONSTANTINE.

[L. J. 32 EXCH.]

This was an action by a female domestic servant against her master for assault. His wife having gone away on a visit, Constantine had taken advantage of her absence to invade the privacy of the maid's sleeping apartments, and had had connection with the plaintiff. On these facts the judge nonsuited Miss Wellock, saying that either the girl had consented to the connection or she had not; if she *had* consented, no assault had been committed; and, if she had not consented, Constantine had committed a rape, and must be tried for that before any civil action could be brought against him.

[133.]

WELLS v. ABRAHAM'S.

[L. R. 7 Q. B.]

Mr. Wells, becoming impecunious, thought it time to make friends with some of the Lost Tribes. He instructed his wife to take a quantity of jewellery, including a magnificent brooch, to the shop of Mr. Abrahams, and get a substantial loan on the security. The negotiations came to nothing, and Abrahams returned a packet purporting to contain the jewellery. When, however, the packet came to be opened, there was no brooch inside, and Mrs. Wells, being of a shrewd and impulsive nature, immediately wrote to Abrahams and charged him with having stolen it. Instead, however, of a prosecution for felony, this action of trover was brought against the Jew, and a verdict was

found for the plaintiff for £150. The question now was whether the judge ought not to have nonsuited the plaintiff, on the ground that the facts showed a felonious taking of the brooch, and *Wellock v. Constantine* was cited. It was held, however, that the judge was quite right in not having nonsuited, for he was bound to try the issues on the record.

"It is undoubtedly laid down in the text-books," says Lush, J., in *Wells v. Abrahams*, "that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced we are nowhere informed." And probably the result of *Wells v. Abrahams* (which, it will be seen, is in direct conflict with *Wellock v. Constantine*) is to render the rule in most cases a nullity. Perhaps the best way of enforcing the rule would be for the judge to interpose in a summary way whenever a gross case of the sort comes before him, and to say in an impartial but absolute way—"I can't allow this case to go on. If what these witnesses say is true, the defendant is guilty of a felony, and he must be tried for it before any one can bring an action against him." A perusal of the judgments in the recent case of *Ex parte Ball* (where the question was whether some bankers could prove in bankruptcy for a large sum of money which the bankrupt, one of their clerks, had embezzled, without having prosecuted him) will show how doubtful and unsatisfactory is the present state of the law on the subject.

It is to be observed that the rule only applies where the action is against the person guilty of the felony. It does not prevent the suing of an innocent third party. If a person has stolen my books and sold them to a bookseller, I may bring an action of trover against the bookseller, altho' I have not made the faintest attempt at prosecuting the thief. It is also to be observed that the rule applies only to felonies. For a misdemeanour, such as assault or libel, the aggrieved person may bring an action quite regardless of the fact that the defendant is really a criminal.

See *Crosby v. Leng*, 12 East, and *Stone v. Marsh*, 6 B. & C.

10 Ch. Div.

White v. Spettigue, 13 M. & W.; and see *Osborn v. Gillett*, L. R. 8 Exch., and 9 & 10 Vict. c. 93, s. 1.

Privity.

[134.]

LANGRIDGE *v.* LEVY.

[4 M. & W.]

Mr. Langridge, senior, walking one day down the streets of Bristol, noticed a gun in a shop window with the following seductive advertisement tied round its muzzle:—

“Warranted, this elegant twist gun by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas; can be had for 25.”

He entered the shop, which was the defendant’s, and told him he wanted a nice quiet steady-going gun for the use of himself and his sons. Finally, he bought the elegant twist gun, as warranted.

Now, we regret to say, this warranty was false and fraudulent to the defendant’s knowledge, and, shortly after the purchase, one of the young Langridges was using the gun in a perfectly fair and sportsmanlike manner when it burst and blew off his left hand.

It was this victim of Levy’s dishonesty who now brought an action against him, and the chief point relied on by the defendant’s counsel was that, if any one had a right to bring an action, it was the father, to whom the gun had been sold; as for the son, they said, there was no privity of contract between him and the gunsmith. This defence, however, did not succeed, and the youthful Langridge got as much consolation as money could give him for the loss of his hand.

A particular transaction may sometimes be looked at as affording the right to bring an action either for the breach of a contract or in tort. Take, for instance, the too familiar case of a railway disaster caused by the company’s negligence: the company are liable to the passenger in contract, because they gave him a ticket, and in tort

because they were not sufficiently careful in carrying him. In such a case as this there is clearly direct privity between the plaintiff and the defendants.

But, generally speaking, privity is not necessary to support an action in tort. In *Langridge v. Levy* the person with whom the contract was made, and with whom alone there was privity, was the father, and yet the son was allowed to bring an action and recover damages. The reason of this is that Levy had been guilty of a tort in making a false representation. If he had made no false representation he would have only been liable to the father for breach of contract. As it was, he was held liable to the son, who confided in the representation, and who, he knew, was going to use it. It is to be observed, however, that if the plaintiff had been a friend of the family whose use of the gun was not contemplated by Levy at the time of the sale, no action could have been successfully maintained. *George v. Skivington*, where a chemist sold some poisonous hair-wash for the use of a customer's wife, is a subsequent case precisely analogous to *Langridge v. Levy*, with the substitution of negligence for fraud. But both these cases must be carefully distinguished from *Longmeid v. Holliday*, where a tradesman, in all honesty, warranted a defective lamp to be sound. The lamp exploded and injured a person who was not a privy to the contract, but whose use of the lamp had been contemplated by the seller. This person, it was held, could not maintain an action against him, not in contract, because the plaintiff was not privy to the warranty; not in tort, because the defendant, saying only what he believed to be true, was not guilty of any tort.

And, generally, when a wrong is founded on a contract, no one not a privy to the contract can sue in respect of such wrong. A master, for instance, who had had nothing to do with the taking of the ticket, and was not in any way a party to the contract, could not sue a railway company for loss of the services of one of his servants as for a breach of their contract with the man to carry him safely. But if a railway company contract with a master to carry his servant, and in doing so are guilty of negligence, which causes bodily hurt to the servant and consequent damage by loss of service to the master, the company may be sued in contract by the master and in tort by the servant. The very recent case of *Berringer v. Great Eastern Railway Co.* deserves attention. It was an action by a father, a butcher, for loss of the services of his son, who had helped him in the shop. The boy had taken a ticket from the London, Tilbury, and Southend Railway Co., and was injured at Stepney by the negligence of the defendant company. The point was raised for the defence that there was no privity of contract between the plaintiff and the defendant. But the court held that

Parry v. Smith, 4 C. P. D.; but see *Collis v. Selden*, L. R. 3 C. P.

L. R. 5 Ex.

6 Exch.

Alton v. Midland Railway Co., 34 L.J., C. P.

Marshall v. York, &c., Railway Co., 11 C. B. 4 C. P. D.

the claim was valid, saying, "The claim is against the company, not parties to the contract of carriage, for a pure tort, such as would be committed if a vehicle in the highway were wrongfully driven against, or across the path of, another vehicle, whereby a servant therein was hurt and his master lost his services."

Actions against Magistrates.

[135.]

CREPPS *v.* DURDEN.

[COWP. & S. L. C.]

It was very wrong, of course, of Peter Crepps to be selling hot rolls on a Sunday morning instead of being at church listening to Mr. Stick-in-the-box, and as it could not well be called a "work of charity" it was no doubt a violation of the Act of Charles II. of pious memory. But the Act provides for a fine of 5s. only to be inflicted on the offender, and, therefore, that worthy magistrate of Westminster, Mr. Durden, had no business whatever to say that because Crepps had sold four hot rolls he should be fined £1—that is to say, 5s. a roll. This was distinctly laid down to him by Lord Mansfield: "The penalty incurred by this offence is 5s. There is no idea conveyed by the Act that if a tailor sews on the Lord's Day every stitch he takes is a separate offence. . . . There can be but one entire offence on one and the same day."

It occasionally becomes a man's painful duty to bring an action against a magistrate. On this subject the student is referred to 11 & 12 Vict. c. 44, "An Act to protect justices of the peace from vexatious actions for acts done by them in the execution of their office." It is sufficient here to point attention to the first two sections of this Act, which provide that if the act complained of was done by the magistrate as to any matter *within his jurisdiction*, the plaintiff must show that he acted *maliciously and without reasonable and probable cause*, and that if it was done in a matter in which the

magistrate had *no jurisdiction*, or if he *exceeded his jurisdiction*, the plaintiff must show that the conviction or order has been quashed.

Other sections of this Act specify the time within which the action is to be brought, the notice of action required, the way and effect of tendering amends, &c., and in various other ways the justice of the peace is hedged about and protected against litigious evil-doers.

It may be mentioned that the jurisdiction of magistrates at petty sessions is generally ousted if a *bonâ fide* claim of right is made by the defendant—the *bona fides* being a question for the magistrates to determine. But however *bonâ fide* the claim may be, it will not oust jurisdiction if it be of an *impossible right*, such as a claim by a member of the public to fish in a non-navigable river. 24 & 25 Vict. c. 100, s. 46, provides “that nothing therein contained shall authorise any justices to hear and determine any case of assault and battery in which any question shall arise as to the title to any lands.” It has been held that this section prevents the magistrates from convicting even in a case where the defendant has used more violence than was necessary. But the terms of a statute may give the magistrates jurisdiction if the claim, tho’ *bonâ fide*, is unreasonable; and again, their jurisdiction remains in cases where they are empowered by statute to ascertain a fact which necessarily involves a question of title.

Hargreaves v. Didams, L. R. 10 Q. B.

Reg. v. Pearson, L. R. 5 Q. B.

White v. Feast, L. R. 7 Q. B.; but see *Denny v. Thwaites*, 2 Ex. Div.

Notice of Action.

ROBERTS *v.* ORCHARD.

[136.]

[2 H. & C.]

Mr. Orchard was a draper in Argyle Street, London, and the other litigant had been one of his shopmen. While so employed, Mr. Orchard suspected him of helping himself to a florin on a certain occasion, and gave him into custody. The magistrates, however, thought there was no evidence against the man, and at once discharged him. This was an action for assault and false imprisonment, and the great question was whether the defendant ought to have had notice of action, as provided by 24 & 25 Vict. c. 96, s. 113. That Act of Parliament says that any person

"found committing" any offence punishable by virtue of that Act, with the exception of angling in the day-time, may be immediately apprehended without a warrant. It was held that it was not sufficient to entitle the defendant to notice of action that he believed the plaintiff to have *dishonestly taken* the florin; he was not entitled to such notice unless he believed that the plaintiff had been "*found committing*" the offence. The proper question to be left to the jury in such a case was—Did the defendant honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?

A great number of statutes, with the object of protecting persons filling public offices or discharging public duties, require that a month's notice shall be given before an action can be commenced against them. It is sufficient here, without going in detail into the subject, to warn the student generally against a pitfall into which many an unwary practitioner has tumbled.

As to the form of the notice, the statute requiring it should in each instance be consulted. Speaking generally, however, it may be said that it is sufficient if it conveys to the mind of the defendant reasonable information of what the complaint is. In a recent case a man went to law with a Lancashire Local Board for an injury to his horse, caused by part of the road over which it was being driven suddenly giving way. In the notice of action which, by the Public Health Act, 1848 (11 & 12 Vict. c. 63), he was bound to give, the plaintiff only complained of the defendants' *non-feasance*, whereas, he was really suing them for *mis-feasance*. But it was held that the notice was sufficient in spite of the omission. "The object of a notice of action," said the Court, "is to enable a party to tender amends; and therefore it is sufficient if it states substantially the nature of the complaint."

Smith v.
West
Derby
Local
Board,
47 L. J.
C. P.

Malicious Prosecution.

PERRYMAN v. LISTER.**[137.]****[L. R. 4 H. L.]**

Mr. Lister was the owner of a rifle, which was left under the charge of his coachman, one Hinton. One day a man named Perryman happened to call on Hinton, and, seeing the rifle, exclaimed what a capital one it was, and how much he would like to have just such another. Not long afterwards the rifle was missed. Hinton reported the loss to his master, and at the same time informed him that one Robinson, the coachman of a gentleman living in the neighbourhood, had seen it in a barn where Perryman lived, and had asked him what he was doing with Lister's gun, to which Perryman had replied, "It is not Lister's gun; it is my gun;" but that Robinson said he was sure the gun he saw was the one Lister had missed. Hinton added that he had since gone with Robinson to Perryman's, and had been shown a gun which was not Lister's, and which Perryman said was the only gun he had. Perryman, having been tried and acquitted on the charge of stealing the rifle, now brought an action for false imprisonment. The judge at the trial directed the jury that, as Lister had not seen Robinson before causing Perryman to be arrested, he had acted on hearsay evidence alone, and without "reasonable and probable cause." This, however, was held to be a misdirection, on the ground that Lister had "reasonable and probable cause" for instituting a prosecution; and the principle was distinctly affirmed that it is for the jury to find the facts on which the question of reasonable and probable cause depends, but for the judge to determine whether the facts found do constitute reasonable and probable cause.

In an action for malicious prosecution the plaintiff must prove four things:—

1. That the defendant preferred a criminal charge against him before a judicial officer ;
2. That, in doing so, he acted maliciously ;
3. That he acted “without reasonable or probable cause ;” and
4. That the proceedings terminated in the plaintiff’s favour.

As to the first of these requisites, “there can be no malicious

Per Willes, J., in *Austin v. Dowling*, L. R. 5 C. P. *Leigh v. Webb*, 3 Esp.

prosecution until the parties come before a court or a judicial officer.”

If a person acting conscientiously, and like an honest man, comes before a magistrate and makes his complaint, and the magistrate foolishly treats as a felony what is really only a civil matter, and issues his warrant accordingly, the person making the complaint is not answerable for the magistrate’s mistake. As to malice, it will generally be inferred if it be shown that the defendant acted

Turner v. Ambler, 10 Q. B.

without reasonable and probable cause. But, on the other hand, it would not serve the plaintiff’s purpose to prove malice alone, for a person may be actuated by the bitterest malice and yet have plenty of ground for prosecuting. A prosecution, which is not malicious to start with, may become so by the prosecutor discovering that the defendant is really innocent, and yet going on with the pro-

Per Cockburn, C. J., in *Fitzjohn v. Mackinder*, 9 C. B., N. S. *Steward v. Gromett*, 7 C. B., N. S.

secution. Whether there was reasonable and probable cause is, as we have seen, a question of law for the judge. On such an enquiry, evidence that the prosecutor himself did not believe in the truth of the charge would be very strong. It may happen that the proceedings were incapable by their nature of terminating in the plaintiff’s favour, as in a case where the defendant had maliciously exhibited articles of the peace against the plaintiff. In such a case the plaintiff is excused from the proof.

No Contribution between Defendants in Tort.

[138.]

MERRYWEATHER v. NIXAN.

[8 T. R. & S. L. C.]

Merryweather and Nixan in the fulness of their animal spirits destroyed the machinery and injured the mill of a Yorkshireman named Starkey. The mill-owner was not prepared to submit tamely, and brought an action against

the pair of them. The jury gave him £840 as damages, and, instead of getting £420 from each he made Merryweather pay the whole £840. Merryweather,—small blame to him,—did not see why he should pay for Nixan's whistle as well as his own, and sued his "pal" for contribution, that is to say, for £420. In fairness, of course, Nixan ought to have made no difficulty about paying it; but he steadfastly declined to do anything of the sort. The law backed him up in this refusal, for *ex turpi causâ non oritur actio*, which means that a man shall not be allowed to found an action on something that he ought to be ashamed of; and Merryweather ought to have been very much ashamed indeed of having injured Starkey's mill.

There is no contribution between defendants in tort. In contract there is. If there are two sureties, and one of them is made to pay the whole debt, he can sue his brother surety for half of what he has paid. In such a case there is no *turpis causa*.

But the rule that one tortfeasor cannot sue another for contribution does not extend to the case where the former has acted quite innocently in the matter, and was simply obeying what he believed to be the lawful instructions of his employer. Such a person may not only sue for contribution, but may claim an absolute indemnification. If A. orders B. to drive cattle out of a field, and in obeying such order B. unwittingly commits a trespass, A. must indemnify him; but it would be different if the order given and obeyed was to commit an unjustifiable assault which B. must have known to be wrong.

On the same principle on which the leading case proceeds (*ex turpi causâ*, &c.) a person who has paid money in pursuance of an illegal contract is (unless there has been oppression, or the illegal purpose has not been carried out) prohibited from recovering it.

See *Whitcher v. Hall*,
p. 16.

Pearson v. Skelton,
1 M. & W.

Atkinson v. Denby,
6 H. & N.
Taylor v. Bowers,
1 Q. B. D.
McKinnell v. Robinson, 3 M. & W.

Measure of Damages in Tort.

VICARS v. WILCOCKS.

[139.]

[8 EAST & S. L. C.]

Stored in his rope-yard, Mr. Wilcocks had a quantity of excellent cordage, which he was disgusted one day to find

cut to ribbons. "An enemy hath done this!" was his somewhat obvious exclamation, when he surveyed the scene, and he set himself to discover which particular enemy he had to thank for it. For reasons which the reporter does not favour us with, Mr. Wilcocks's suspicions lighted on one Vicars, the servant of his neighbour, Mr. Joshua Oakley, and not being the man to keep his opinions to himself, he proclaimed loudly on the housetops, and in language more forcible than elegant, that Vicars was the scamp who had cut his cordage. By and by it came to the ears of the worthy Mr. Oakley that one of his servants had been damaging a neighbour's property. He was highly incensed, and, tho' Vicars had been engaged for a year which was not nearly expired, he immediately, and without taking the trouble to sift the matter, discharged him. Turned away by his master, the maligned Vicars sought employment from a Mr. Roger Prudence; but Roger too had heard of the cut cordage and refused to take the reputed perpetrator of the outrage into his service on any terms. In this extremity a happy thought, as the luckless litigant then considered it, occurred to him: why not bring an action against the owner of the cordage for slander, and lay as special damage the dismissal by Oakley and the rejection by Prudence? Quirk, Gammon and Co. were accordingly instructed; but the result did not correspond to his sanguine anticipations. Because, forsooth, the first special damage alleged was not the legal but the illegal consequence of Wilcocks's winged words,—illegal, because Vicars had been engaged for a year, and therefore his master could not dismiss him in this summary way,—and because the court considered it was far more likely that Prudence's refusal to employ him arose from the simple *fact* of his having been dismissed from his last place than from the *reason* for such dismissal, Vicars got no good by going to law.

LUMLEY v. GYE.

[140.]

[2 E. & B.]

Mr. Lumley, the enterprising lessee and manager of the Queen's Theatre, engaged a fascinating young lady to sing and perform on his boards for a period of three months. During the three months Mr. Gye, a rival manager, persuaded her to break her engagement, and leave Mr. Lumley; and it was for this interference that the present action was brought. After numerous wise saws, and instances of various dates, it was held (in spite of the dissent of Coleridge, J., who thought that such an action could only be brought when the strict relationship of master and servant existed) that Mr. Lumley had a perfect right to bring the action and recover damages.

Lumley v. Gye has overruled *Vicars v. Wilcocks*, which is inserted more for old times' sake than for any special utility it is likely to be of to the student. In *Vicars v. Wilcocks* it was laid down that the damage in respect of which an action is brought must have been the legal consequence of the defendant's act. If, for instance, as the consequence of the defendant's slander, a mob had ducked the plaintiff in a horse-pond, such a consequence would be an *illegal* and unnatural consequence of the slander, and could not be taken into account in estimating the compensation to be paid by the defendant to the plaintiff. *Lumley v. Gye*, however, alters this rule by allowing the wrongful act of a third party to form part of the damage where such wrongful act might be naturally contemplated as likely to arise from the defendant's conduct.

The damage, however, must not be too remote. Where, for instance, the defendant libelled a public singer, in consequence of which she broke her engagement with the plaintiff, and would not sing, the plaintiff's injury was considered too remote. So it was too in another case, where the manager of a theatre brought an action against a person who horse-whipped one of his actors so soundly as to prevent him from performing. The cases of *Allsop v. Allsop* (where a married lady was made ill by the defendant's imputing incontinency to her), *Ward v. Weeks* (where somebody repeated the defendant's slanderous words), and *Hoey v. Felton* (where a

Ashley v. Harrison,
1 Esp.
Taylor v. Neri,
1 Esp.
5 H. & N.
7 Bing.
11 C. B.,
N. S.

young man missed an engagement through the defendant's falsely imprisoning him), may also be referred to, all being cases in which the damage was held to be too remote, and not the direct and immediate result of the defendant's wrongful act.

The rules by which damages are assessed are much looser in tort than in contract. Juries may generally take into account the defendant's motives and means, so that, for instance, in an action for seduction, which in point of form merely purports to give a recompense for loss of services, the plaintiff would recover very different damages according to the fortune of the seducer and the circumstances under which he had accomplished his purpose. Juries in fact, have a very wide discretion, and there seems to be an increasing unwillingness of the courts to interfere with their verdicts on the ground of excessive damages. They may look into all the circumstances, and award damages according to the way the parties have conducted themselves. In one case, where the action was for trespassing on the plaintiff's land, and the evidence showed that the defendant had made use of very offensive language, the jury returned a verdict for £500 damages, and the court refused to grant a new trial, saying, "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half penny for you, which is the full extent of all the mischief I have done !' Would that be a compensation ?"

*Merest v.
Harvey,
5 Taunt.*

On the other hand, where it is evident that the jury have not given proper consideration to all the elements of the plaintiff's claim, the courts will grant a new trial on the ground that the damages are insufficient.

*Phillips v.
S. W. Ry.
Co., 4 Q.
B. D.
9 & 10
Vict. c. 93.
Blake v.
Mull. Ry.
Co., 18
Q. B.*

In an action under Lord Campbell's Act there are certain definite principles on which the damages are to be assessed. The jury must confine themselves to a *pecuniary estimate* of the injury the relatives have sustained by the death. Damages cannot be given to soothe the feelings of those who mourn the Goodman of the house. But a reasonable expectation of pecuniary benefit from the continuance of "the thin-spun life" can be taken into account. The jury, for instance, may give compensation for the loss of the benefit of a superior education which the children would have received if their father had lived. Only one action, whether under Lord Campbell's Act or by the injured man himself, can be brought in respect of personal injuries. If the deceased in his lifetime recovered damages for the injury done him, his relatives cannot bring another action after he is dead. But if a man has been fraudulently induced to accept a sum and sign a release by deed—by being told, for instance, that his injuries are of a very trifling nature, and that if he got worse he

*Pym v.
G. N. R.
Co., 4
B. & S.*

*Read v.
G. E. Ry.
Co., L. R.
3 Q. B.*

could claim fresh damages—in that case he (or, if he died, his representatives) could maintain a subsequent action. A policy of insurance which the injured man may have effected is not to be taken into account in considering the damages, but if the insurance money covers the whole consequences of the injury, he is a trustee for the insurers of the money he receives from the people who have hurt him.

Hirschfield
v. *L. B. &*
S. C. Ry.
Co., 2 Q.
B. D.
Bradburn
v. *G. W.*
Ry. Co.,
L. R. 10
Ex.

There seems to be an increasing public opinion that railway companies are hardly dealt with in the matter of damages in cases where they have been guilty of negligence. Suppose that two men, one a physician making £5000 a-year by his profession, the other an ordinary citizen, take first-class tickets from King's Cross to Doncaster, and both are equally injured during the journey by the railway company's negligence, they will recover very different damages, tho' the default of the defendants is precisely the same towards both of them. And it is submitted that it would be much fairer if some system were introduced by which a person should *declare his value on taking his ticket*, and pay more for that ticket in consequence; and if no such declaration were made, the railway company should not be liable to him to a greater extent than £1000.

Hearsay.

DOE *d.* DIDSBURY *v.* THOMAS.

[141.]

[14 EAST & S. L. C.]

In this case a lady named Ann Didsbury brought an action of ejectment to get hold of a farm of thirty-five acres, called the Meadow Farm, at Tideswell in Derbyshire. She claimed it under the will of a Mr. Samuel White, who had long ago gone where only his own whiteness can be excelled. The will was dated November 26th, 1754, and the chief obstacle to Ann's success was to prove that the lands were the testator's at that time. In support of her case she called a witness who swore that the farm in question, together with another farm called Foxlow's Croft, was reputed to have been Sir John Statham's, and

to have been purchased at the same time with it by Samuel White of Sir John. That of course alone did not fix any particular date. But to supplement this evidence, and make it serve the good woman's cause, a deed was produced dated March 25th, 1752, whereby in consideration of natural love and affection old Samuel White bargained and enfeoffed his son Edward of Foxlow's Croft, "all which said farm, &c., have been lately purchased *amongst other lands and hereditaments* by the said Samuel White of and from Sir John Statham."

It was clearly proved that Richard, the testator's eldest son, had taken possession of and occupied the Meadow Farm at the same time that his younger brother Ned had begun to occupy Foxlow's Croft; and also that the person immediately preceding Richard in the occupation of the Meadow Farm was tenant to Sir John: and the plaintiff's counsel argued that under the circumstances the evidence of reputation could be received. It was held, however, that the evidence could not be received, as reputation is not admissible in questions of private right.

"I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up if you please, Mr. Weller."

"I mean to speak up, sir," replied Sam. "I *am* in the service o' that 'ere gen'l'man, and a wery good service it is."

"Little to do and plenty to get, I suppose?" said Serjeant Buzfuz, with jocularly.

"Oh, quite enough to get, sir; as the soldier said ven they ordered him three hundred and fifty lashes," replied Sam.

"You must not tell us what the soldier, or any other man said, sir," interposed the judge, "it's not evidence."

The reasons generally given why what the other man said is not evidence are that he was not on his oath when he said it, and that he cannot be cross-examined. But the real principle of the exclusion would seem to be, that "all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected."

Best on
Evidence,
p. 629.

The chief exceptions to the rule that "hearsay is not evidence" are the following:—

1. Hearsay is admissible respecting matters of *public and general interest*, such as the boundaries of counties or parishes, claims of highway, &c. The reason for the exception in this case is that the origin of such rights is generally obscure and incapable of better proof, that people living in the district are naturally interested in local matters and likely to know about them, and that reputation cannot well exist without the concurrence of many persons who are strangers to one another and yet equally interested. Such declarations, however, to be evidence must have been made *ante litem motam*, that is, before any dispute on the subject has arisen. They must also be confined to *general matters*, and not touch *particular facts*. "Thus, if the question be whether a road be public or private, declarations by old persons, since dead, that they *have seen repairs done upon it* will not be admissible; neither can evidence be received that a deceased person *planted a tree* near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy. So, proof of old persons having been heard to say that a *stone was erected*, or *boys whipped*, or *cakes distributed*, at a particular place, will not be admissible evidence of boundary; and where the question was whether a turnpike stood within the limits of a town, tho' evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people, since dead, that *formerly houses stood* where none any longer remained were rejected, on the ground that these statements were evidence of a particular fact."

Butler v. Mount-garrett,
7 H. L. C.

R. v. Bliss,
7 A. & E.

Taylor on
Evidence,
vol. i.,
p. 526.

As the leading case shows, evidence of this kind is not admissible on questions of *private right*. In a case in which the question was who had the right to appoint to the head-mastership of Skipton-in-Craven grammar-school, an old man of eighty years was produced to prove the tradition he had received from his ancestors as to the mode of election in their time, but the evidence was rejected on the ground that the question in dispute was one of private right. Similar evidence was rejected in a case where the question was whether the sheriff of a county (Cheshire) or the corporation of the county town were charged with the duty of executing criminals. An *ex officio* information was filed by the Attorney-General against the High Sheriff for not having executed some murderers; and the chief witness for the Crown was the Clerk of Assize. In cross-examination he was asked whether he had not heard it reported amongst old persons in Chester that the corporation were bound to execute. But the clerk's evidence on this point was not allowed to be given. "This," said Littledale, J., "is a private question, whether the sheriffs of the county or the city are to perform a duty. The citizens of Chester may, perhaps, have a particular interest; and how do we know that there may not be a grant of felons' goods to

Withnell v. Gartham,
1 Esp.

R. v. Antrobus,
2 A. & E.

them? However this matter may be, the question is immaterial to the public."

It seems to be a doubtful point whether evidence of reputation can be given to prove or disprove a private prescriptive right or liability in which the public is interested. Such evidence, however, was admitted in a case in which the inhabitants of a county, being indicted for non-repair of a public bridge, pleaded that certain specified persons were bound *ratione tenuræ* to repair it.

R. v. Bedfordshire,
4 E. & B.

2. Hearsay is admissible in matters of *pedigree*.

"The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

"The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant."

Stephen on
Evidence,
p. 41.

Such declarations, together with inscriptions on tombstones, entries in family bibles, and the like are admissible on the principle that they are the natural effusions of a person who must know the truth, and has no motive for misrepresenting it. As in the last case, the declarations must have been made *ante litem motam*; and it is now settled that the persons making them must have been, not merely servants, friends, or neighbours, but members of the family.

Shrewsbury Peerage Case,
7 H. of
L. Ca.

3. Hearsay is admissible in favour of ancient documents when tendered in support of *ancient possession*.

Malcomson v. O'Dea,
10 H. of
L. Ca.

"The proof of ancient possession," said Willes, J., in a disputed fishery case, "is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. In some cases written statements of title are admitted even when they amount to mere assertion, as in the case of a right affecting the public generally; but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting upon the face of them to show exercise of ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be

leases or licences ought to be of no avail. It may be a question whether the absence of proof of enjoyment consistent with such documents goes to the *admissibility* or only to the *weight* of the evidence ; probably the *latter*."

Mr. Justice Stephen in his "Digest" does not place this class of evidence as an exception to the rule excluding hearsay, but gives the effect of it separately, thus : "Where the existence of any right of property, or of any right over property, is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence, or renders its existence improbable, is relevant.

"*Illustrations.*—(a) The question is whether A. has a right of fishery in a river. An ancient *inquisitio post mortem*, finding the existence of a right of fishery in A.'s ancestors, licences to fish granted by his ancestors, and the fact that the licensees fished under them, are relevant.

"(b) The question is whether A. owns land. The fact that A.'s ancestors granted leases of it is relevant."

By the term "ancient document" is meant one which is more than thirty years old. Such a document "comes out of proper custody" when it comes from the place where it might naturally and reasonably have been expected to be found.

4. Hearsay is admissible in favour of *declarations made by persons since deceased against their interest*.

On this subject see *Higham v. Ridgway*, p. 247.

5. Also in favour of declarations made by such persons in the *ordinary course of their business*.

On this subject see *Price v. Torrington*, p. 246.

6. Hearsay is admissible sometimes in favour of *dying declarations*.

This, however, is confined to criminal law. And even then a dying declaration is only admitted when the death of the person making the declaration is the subject of the charge, and the circumstances of the death the subject of the dying declaration. This may sound a hibernianism, but a little thought will convince the student that it is not. The declaration, too, must be made when the declarant has no hope of recovery and is in actual danger of death.

7. Hearsay is admissible as to character.

A Yarmouth grocer named Watson wanted some cheese ; so he wrote to a cheese-factor at Leicester asking for some, and said another Yarmouth grocer named Bumpstead would answer for him. On receiving this application the cheese-factor wrote to Bumpstead, and

Rogers v.

Allen,

1 Camp.

Doe v.

Pulman,

3 Q. B.

asked him about Watson. Bumpstead replied that to the best of his knowledge Watson was a trustworthy person. Watson turned out an unsatisfactory customer, and the cheese-factor went to law with Bumpstead for a fraudulent misrepresentation. In defence, Bumpstead called a witness who was asked by the defendant's counsel, "Was Watson on the 24th of October, 1860, trustworthy to your belief?" This question was held admissible, Bramwell, B., however, dissenting on the ground that the question was one as to the witness's *belief*, and not as to Watson's reputation.

Shcen v.
Bump-
stead, 1 &
2 H. & C.

Counsel defending prisoners sometimes ask a witness to character "Do you believe the prisoner to be an honest man?"

This, however, is wrong; what is wanted is, not the witness's belief, but the reputation the prisoner bears with his neighbours.

8. Hearsay is sometimes admissible as part of the transaction, or, as it is technically called, as part of the *res gestæ*.

Exclamations at the time of an assault, for instance, can be given in a subsequent action. In a rape prosecution, one of the most important witnesses is usually the woman to whom the girl complained. This woman can be asked, "Did she make a complaint to you?" but counsel is not generally allowed to go further and ask, "What did she complain of?" as what she said then was not part of the *res gestæ*.

Declarations by Persons since Deceased.

[142.]

PRICE *v.* TORRINGTON.

[1 SALK. & S. L. C.]

This was an action by a brewer against a noble lord for beer which his household had drunk. The practice at the plaintiff's brewery was for the draymen who had taken out beer during the day to sign their names in a book kept for the purpose before they hied them home for sweet repast and conjugal joys. The particular drayman who had taken Lord Torrington his beer was dead, but he had duly made his entry, and the question was whether it was admissible evidence for the plaintiff. It was held that it was, on the ground that it was an entry made *by a disinterested person in the ordinary course of his business*.

HIGHAM v. RIDGWAY.

[143.]

[10 EAST & S. L. C.]

When was William Fowden born? This was the interesting question on which depended vast estates in the county of Chester. Elizabeth Higham laid claim to them by virtue of a certain remainder; but those who contested her right said that her remainder had been barred by a recovery suffered on April 16th, 1789, by one William Fowden, since deceased. Mrs. Higham's answer to this was that on the day named William Fowden had not yet come of age, and was therefore incapable of suffering recoveries, and barring the remainders of good honest women like herself. So it was that it was strenuously disputed on which side of April 16th, 1768, the late Mr. Fowden had been born. Was he or was he not of age on April 16th, 1789? It was of course the object of Mrs. Higham to make out that he was born later than April 16th; and the most important piece of evidence she adduced in support of that view was an entry in the diary of a man-midwife who, like Fowden, had long since joined the majority. In that diary, under the head of April 22nd, 1768, there was this important entry:—

“W. Fowden, jun.'s, wife,

“Filius circa hor. 3 post merid. natus H.

“W. Fowden, jun.,

“Ap. 22, filius natus

“Wife, £1 6s. 1*d*.

“Paid, 25 Oct. 1768.”

This entry was admitted in evidence on the ground that it was a declaration *against interest*, the law shrewdly suspecting that no one would be such a fool as to put himself down as paid when he had not been.

Altho' *Price v. Torrington* and *Higham v. Ridgway* are both concerned with “delivery,”—the delivery of beer and the delivery of

babies,—they must not be confused. Because made *in the course of business*, and because *contrary to interest*, are two quite different reasons why the entry of a deceased person should be admissible evidence. Moreover, the student must grasp this further distinction. When the entry is admissible as having been made in the ordinary course of the deceased person's business, *only so much of the entry as it was the man's duty to make* is admissible; any other fact which happens to be down in the entry, no matter how naturally, is excluded. In a well-known case it became necessary to show that a person had been arrested *in South Molton Street*. The officer who arrested him had died since the arrest, but it was proposed to put in evidence a certificate made by him at the time of the arrest which specified, with the other circumstances, *the place* of the arrest. It was decided, however, that this could not be done, as the officer was going beyond his duty in putting down the particular spot where he bagged his man.

Chambers
v. Bernasconi, 1 C.
M. & R.

A different rule, however, prevails as to entries admissible by reason of being contrary to interest. Not only is the entry allowed to prove the particular fact which is against the writer's interest (*e.g.*, that he has been paid), but any other facts which may happen to be stated in the entry. It will be seen that, if this had not been so, Mrs. Higham would not have been able to prove by the entry produced the date of Mr. Fowden's birth, for the only part of that entry which was contrary to interest was the acknowledgment of payment, and that fact, however interesting, would scarcely have aided the good woman's contention.

Another distinction between the two kinds of entry is that the one admissible because made in the ordinary course of business must have been made *contemporaneously*. It is sufficient, however, if what happened in the morning has been entered in the evening.

The word *interest* in "contrary to interest" refers exclusively to *pecuniary* or *proprietary* interest. The entry, for instance, of a deceased clergyman could not be got in evidence to prove a marriage merely by showing that he was liable to prosecution for having assisted in performing it. Provided, however, a pecuniary interest exists, the courts are not critical in weighing the amount of it.

Suessz
Peerage
Case, 11
Cl. & Fin.
Crease v.
Barrett, 1
C. M. & R.
Howe v.
Malkin, 40
L. T., N. S.
Short v.
Lee, 2 Jac.
& W.

The statements of persons in possession of land explanatory of the character of their possession are, if made in disparagement of the declarant's title, good evidence. But the declarations of limited owners will not avail against reversioners or remaindermen. By what is sometimes thought a curious anomaly, entries in the books of deceased rectors are evidence in favour of their successors.

Doe v.
Vowles,
1 M. &
Rob.

It appears to be a moot point whether an entry is admissible as contrary to interest when such entry is the *only evidence* of the *charge* of which it shows the subsequent payment.

Gift.

IRONS v. SMALLPIECE.

[144.]

[2 B. & ALD.]

Twelve months before his death, and while he believed himself to be still in the prime of life, Mr. Irons, by word of mouth, made his son a present of a pair of horses. The horses, however, were not delivered over by the donor to the donee, but remained in the father's possession until his death; and this was an action by the son, after the old gentleman's death, to obtain possession of them. In this attempt, however, he failed, on the ground that "by the law of England, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." I.e., under seal.

And it is said that the necessity for delivery is not dispensed with, altho' the chattel is already in the possession of the donee. Shower v. Pilch,

It is to be observed that, even where there is neither delivery nor deed, if the donor declares that he retains possession *in trust* for the donee, equity will enforce the trust. 4 Exch.

A *donatio inter vivos*, such as the leading case has to do with, must be carefully distinguished from a *donatio mortis causâ*. A *donatio mortis causâ* is a conditional gift of personalty. The donor would prefer that he himself should be the owner rather than that the donee or anybody else should (a); but he expects to die, and, knowing that he cannot carry his property away with him, he hands it over to the donee to be his in the event of death. But the gift will be defeated not only by the donor's getting better, but also by his revoking the gift. Railway stock cannot be given in this way, nor can a cheque, unless negotiated before the donor's death; but bonds, mortgages, promissory notes payable to order, tho' not indorsed, &c., can. Ellison v. Ellison,
6 Ves.

(a) Et in summâ mortis causâ donatio est cum magis *se quis velit habere quam cum cui donatur*, magisque *cum cui donat quam heredem suum*. Just. Inst., Lib. 2, Tit. 7.

Highways.

[145.]

DOVASTON v. PAYNE.

[2 H. BL. & S. L. C.]

Dovaston's complaint against Payne was that he had taken and impounded his cattle without rhyme or reason:—

“My kine are gone, and I have no more,
Which Payne hath caught and doth keep away,”

was his melancholy refrain.

Called on for an explanation, Payne said he had caught the beasts breaking down his fences and ruining his crops; he had taken them *damage feasant*, in fact. Such were the replevin and the avowry. It was now Dovaston's turn to plead, which he did to this effect:—

“Well but, my friend, if they were, as you say, in your field damaging your crops, and all the rest of it, it was entirely your fault for not keeping your fences in proper condition. There they were,—the sweet innocents,—‘in the highway,’ and how could they know where they had a right to go and where they had not?”

The weak point of this pleading,—probably drawn by some youthful barrister called the day before,—was that, by alleging that his cattle were “in” the highway instead of “passing along,” Dovaston had not excluded the chance of their being trespassers. They might very well be “in” the highway without being quietly and peaceably “passing along” it, like sober, well-conducted cattle.

S. L. C. makes *Dovaston v. Payne* the peg on which to hang a disquisition on the law of highways, and, as it is a more or less important branch of the law, so will we.

A highway may be defined as a passage which all the Queen's subjects have a right to use. Of highways there are several kinds, such as footpaths, turnpikes, streets, and public rivers.

The amount of interest that the public have in a highway is well put by Heath, J., in *Doraston v. Payne*—"The property is in the owner of the soil, subject to an easement for the benefit of the public." An easement, nothing more. Thus, in *R. v. Pratt*, the defendant was held to have been properly convicted of trespassing in search of game, tho' he did not go off the road. The presumption is, that half the highway belongs to the proprietor of the lands on the one side and the other half to the proprietor of the lands on the other side. Either of these gentlemen could therefore bring an action against a gipsy who permitted his cattle to graze on the wastes by the side of the road. But the presumption may be rebutted, and, indeed, in districts to which the Public Health Act, 1875, applies, it does not arise at all.

The dedication of a highway to the public is a question of *intention*, the intention, however, being *presumed from user*. It is uncertain how much user is necessary to constitute a dedication, tho' it may be safely said that six years at least is necessary. If an owner does not wish the presumption of dedication to arise, he should put a bar across, or do some act to show that he does not intend to dedicate. Of course, if the act of dedication be unequivocal, the dedication may take place immediately. The dedication of a highway may be limited, *e.g.*, for all purposes *except that of carrying coal*, or where a bridge is to be used only when the river is so swollen that persons who attempted to ford it would be drowned, or where a footway is liable to be ploughed up occasionally, or where (but only by virtue of a custom) you and I would not be allowed to go, but only a particularly privileged portion of the public. It is to be observed also that a highway may be dedicated with an obstruction on it, so that the dedicator would not be responsible for an accident happening by reason thereof. In a recent case, the point arose (tho' it became unnecessary to decide it) whether a lessee can dedicate to the public. Probably, however, it may be said, he has not such power.

The obligation of repairing a highway generally falls on the occupiers of lands in the parish through which the highway runs. In 1835 was passed the General Highway Act, 5 & 6 Wm. IV. c. 50, which provides that the highways shall be kept in repair by a highway rate levied by the surveyor, a personage annually appointed by the ratepayers in each parish. A statute of 1862 enables the justices at Quarter Sessions to form several parishes into one district to be governed by a highway board. In 1878, also, some legislation on the subject took place. It has been held that there is nothing in the fact of a road having been set out by an award under an inclosure Act, directing the repair to be done by the adjoining landowners, to prevent it becoming a highway, repairable by the inhabitants at large. Sometimes, however, the burden of repairing falls on a private B.

Coverdale
v. Charl-
ton, 4 Q.
B. D.

Rugby
Charity v.
Merry-
weather,
11 East.

Stafford v.
Coyney,
7 B. & C.

Fisher v.
Prowse,
2 B. & S.
Att.-Gen. v.
Biphos-
cated
Guano Co.,
40 L. T.,
N. S.

41 & 42
Vict. c. 77.
Reg. v.
Bradfield,
L. R. 9 Q.
B.

person *ratione tenuræ*, by virtue of his having repaired from time immemorial,—a reason which reminds one of the definition of *gratitude*, that it is the *expectation of future favours*.

Turnpike roads have toll-gates, and are managed by trustees. They are created by a local Act of Parliament. The present general Turnpike Act is 3 Geo. IV. c. 126, but other statutes have since been passed. In some cases part of the highway rate is ordered to be applied towards the keeping up of turnpikes, for the parish is bound to repair these roads, as well as general highways. Those who ride and drive much are glad to be able to believe that there is a great deal of disturnpiking, and consequent abolition of toll-bars, going on.

“Once a highway, always a highway,” is a common law maxim; but power is now given to justices of the peace to divert or extinguish highways; and it has been held in a recent case that, when access to a highway has become impossible by the ways leading to it having been legally stopped up it ceases to be a highway. “The great difficulty here,” said Denman, J., in the case referred to, “seems to arise from the familiar dictum ‘once a highway, always a highway,’ and from the necessity of now, for the first time, placing a limitation on it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, tho’ it has not been stopped by statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen’s subjects can have access, loses its character of a highway.”

Bailey v.
Jamieson,
1. C. P. D.

Contracts made Abroad, &c.

[146.]

FABRIGAS v. MOSTYN.

[COWP. & S. L. C.]

By the Peace of Paris, which in 1763 put an end to the Seven Years’ War, the island of Minorca in the Mediterranean became a British possession. In 1770 the governor of this island was a gentleman named Mostyn, who apparently was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage. One of his subjects, however, a Mr. Fabrigas, did not coincide with him in this view, and he rendered

himself so obnoxious that the governor laid hands suddenly on him, and, after keeping him imprisoned for a week, banished him to Spain.

It was for this arbitrary treatment that Fabrigas now brought an action *at Westminster*. Mostyn objected that, as the alleged trespass and false imprisonment had taken place in Minorca, the action could not be brought in England. But it was held that, as the cause of action was of a transitory and not a local nature, it could. And a British jury gave Fabrigas £3000 damages.

Actions were formerly divided into *local* and *transitory*: *local*, such as could be tried only in the county in which the cause of action arose (*e.g.*, an action of trespass to land); *transitory*, such as could be tried wherever the plaintiff chose (*e.g.*, an action for an assault). But, through a provision of the Judicature Act, which abolishes local venue and allows the plaintiff, subject to its being changed by a judge, to name any county he pleases for the place of trial, the case has lost its old importance, and governor Mostyn and his doings are chiefly of antiquarian interest.

It may be still, however, taken to "lead" as to the law relating to contracts entered into abroad and sought to be enforced in England. Such contracts are primarily to be expounded according to the law of the place where made,—the *lex loci contractus*, as it is called. For example, if by the French law the property in a bill of exchange payable to order is not passed without a *special* indorsement, the holder of a bill drawn in France and there indorsed to him *in blank* cannot sue on it here, altho' in the case of an English bill a blank indorsement would have sufficed. But this rule admits of an exception in the case where the parties intended the contract to be executed in a country other than that in which it was entered into. Contracts which are illegal according to English law, tho' legal according to the law of the country where made, cannot be enforced in England. "When a court of justice in one country is called on to enforce a contract entered into in another country, the question is not only whether or not the contract is valid according to the law of the country in which it is entered into, but whether or not it is consistent with the law and policy of the country in which it is to be enforced; and if it is opposed to those laws and that policy, the court cannot be called on to enforce it." And altho' a contract is to be expounded according to the law of the place where made, *proceedings to enforce it* are governed by the law of the place where the action is brought,—the *lex loci fori*. For example, if an agreement be one of

Trimbey v. Vignier, 1 Bing, N. C., and *Bradlaugh v. De Rin*, L. R. 3 C. P.; and see *Horne v. Rouquette*, 3 Q. B. D.

Santos v. Illidge, 6 C. B., N. S.

Per Turner, L.J., Hope v. Hope, 35 L. J. Ch.

Leroux v. Brown,
12 C. B.

that class which the 4th section of the Statute of Frauds requires to be in writing, a verbal agreement made in a foreign country where it would have been perfectly valid cannot be enforced in England. Similarly, an action on a contract entered into in Scotland, and which might by the laws of that country have been enforced within forty years, has been held to be barred by the English Statute of Limitations.

British Linen Co. v. Drummond,
10 B. & C.
37 & 38
Vict. c. 50,
s. 5.

By the law of Jersey, a husband is still liable for the ante-nuptial debts of his wife. In England, if the marriage has taken place since July 30, 1874, he is liable only to the extent of certain specified assets. A Jersey girl contracted debts in Jersey, and then came to England, and, after July 30, 1874, got married. The lady's Jersey creditor brought an action against the husband, urging that the *lex loci contractus* ought to prevail, and that the husband was liable. But it was held that the husband was not liable, as, the marriage having taken place in England, the Jersey law did not apply.

De Greuchy v. Wills,
4 C. P. D.

It may be observed that when a contract is entered into by letter between two persons living in different countries the place where the contract is considered to have been made, so as to determine the *lex loci contractus*, is the place where the final assent has been given by the one party to an offer made by the other.

As to torts committed abroad, an action lies in England, provided that the tort is actionable both by our law and by the law of the country where the tort was committed. The case of *Phillips v. Eyre* shows how necessary it is that both these conditions should be fulfilled. It was an action for assault and false imprisonment against the ex-governor of Jamaica, the trespass complained of having been committed during a rebellion in that island. The defendant successfully relied on an Act of Indemnity which the Jamaica Legislature had passed, and said that legislation, tho' *ex post facto*, cured the wrongfulness of his acts, and prevented the plaintiff from recovering.

L. R. 6 Q. B.

The case of *The Halley* is another authority on the subject. By the negligence of a pilot, compulsorily taken on board, *The Halley*, a British steamer, in Belgian waters, ran down a Norwegian vessel, *The Napoleon*. By Belgian law the Britisher was liable, but by our law the fact that the pilot was on board, and that the collision was due to his negligence, exempted her. It was held that, under those circumstances, no action lay against her in England. "It is," the Court said, "in their lordships' opinion, alike contrary to principle and to authority, to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages, in respect of an Act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

But, on the other hand, it is no defence to an action for a tort

committed in a foreign country that by the laws of that country no action lies till the defendant has been dealt with criminally, for that is a mere matter of procedure.

The courts do not take judicial notice of the laws of foreign states. Such laws are proved by the oral evidence of persons having a practical acquaintance with them, and whether any particular person tendered as a witness is duly competent is a question for the court. In a case in which the question was whether a London hotel-keeper, but native of Belgium, and who had been a merchant in Brussels, was competent to prove the law of Belgium as to the presentment of promissory notes, Talfourd, J., said: "Foreign law is matter of fact: any person who can satisfy the court that he has the means of knowing it is an admissible witness to prove it. One who has been long in the habit of attending as a special jurymen in the city of London would no doubt be well qualified to speak as to the law of England on many subjects connected with commerce. As to the *admissibility* of this person's evidence, I think there can be no doubt, whatever may have been the *weight* it was entitled to."

Scott v. Seymour,
1 H. & C.

The judgment of a foreign court, if final and conclusive where made, and if not plainly contrary to natural justice, is final and conclusive here.

Fander Donckt v. Thellusson,
8 C. B.

Ricardo v. Garcias, 12
Cl. & Fin.

Husband and Wife.

WENMAN v. ASH.

[147.]

[13 C. B.]

Mr. Ash, an old gentleman of eighty-two, and, according to his own account, "a bit of a prophet,"—tho' on the present occasion he scarcely seems to have made much use of the gift,—wrote a letter to Mrs. Wenman, a lady with whom he had lately been lodging, and said that, tho' he entertained the profoundest respect for herself, her husband was an unmitigated scoundrel, and had stolen some receipts out of his portmanteau. Like the faithful wife she was, Mrs. Wenman showed the letter to her husband, and her husband's wrath was kindled to such a terrible extent that he consulted his solicitor, and brought an action for libel.

"Admitted," said the defence, "that these words are libellous, where is the publication to a third person?"

"Why, my wife is the third person of course."

"Well but, you know, husband and wife are one flesh; when Mr. Ash wrote that letter to your wife it was precisely the same thing as if he had written it to *you*."

And it was learnedly and at great length argued whether there was a sufficient publication. It was decided that there *was*, for, tho' it is true that for some purposes husband and wife are one person, yet for others they are not.

The old common law doctrine was that husband and wife (baron and feme) were one person, and that one person the husband: and the consequences of that doctrine are to this day exceedingly important. A married woman, for instance, *prima facie* cannot contract or hold property; she cannot sue alone; she is not responsible for a felony committed in her husband's presence; she cannot steal his goods; she cannot take a gift from him; and (except when complaining of violence from him and by virtue of one or two special Acts) she cannot be a witness in a criminal trial for or against her husband. Not long ago a lady, whose marriage had been terminated by divorce, brought an action against the gentleman who had been her husband for an assault committed during the coverture. But it was held, on the ground that husband and wife

Phillips v. Barnet,
1 Q. B. D. are one person, that the action would not lie. "It is a well-established maxim of the law," said Lush, J., "that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense. . . . It remains to consider, what is the effect of divorce on this disability? Now, I cannot for a moment think that a divorce makes the marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the Court in each case." *Wenman v. Ash*, however, is a useful authority to show that there is some limit to the common law doctrine. In that case, Maule, J., characterised the position that husband and wife are one flesh, not two fleshes, as "a strong figurative expression." Moreover, the ladies have been gradually and successfully asserting for themselves a separate identity. Equity some time ago permitted a married woman to hold separate estate intact from her husband and her husband's creditors, and in 1870 an important Act, called the Married Woman's Property Act, was

passed, which goes a long way in the same direction. But it has lately been decided that, even when an action is brought against a married woman to charge wages and earnings which by virtue of that Act are her separate property, her husband must be joined as a defendant. Indeed, the only exceptions to the rule that a married woman cannot be sued alone are the following :—

Hancocks
v. La-
blache,
3 C. P. D.

1. When the husband has gone to prison and is civilly dead.
2. When he has not been heard of for seven years and is presumed to be physically dead.
3. When there has been a judicial separation.
4. When the wife has obtained a "protection order."
5. When the husband is an alien enemy; and
6. When under Order XVI., rule 8, of the Judicature Act "the court or a judge" permit it.

So that the saying of the worthy tinker of Elstow is not so far wide of the mark even now, "Women, whenever they would perk it and lord it over their husbands, ought to remember that both by creation and transgression they are made to be in subjection to them."

An interesting and recent case on section 11 of the Act of 1870 is *Lovell v. Newton*, where a drunken husband's creditors had seized 4 C. P. D. certain stock in trade which an industrious wife said was hers. "Looking at the substance and intention of the Act," said Denman, J., "which was to protect the fruits of the talent and industry of married women from being made liable for the debts of their husbands, and having a decision of the Court of Appeal that stock in trade is included within the term 'earnings,' I think we are fully justified, acting as a jury, in holding that Mrs. Newton was carrying on this business separately from her husband, so as to protect the goods in question from being seized for his debt. I wish it to be understood that the only *law* we decide is that the mere fact of the husband living in the house at the time the business is so being carried on does not deprive the wife of the protection afforded her by the Act."

This is, perhaps, the most convenient place to mention the position of the husband as to the contracts his wife entered into before she married him. The effect of marriage on the wife's personalty *in possession* is to make it absolutely the husband's. But this is not so as to her *choses in action*. In order that they may become the husband's, he must do some act which the law calls a *reduction into possession*: for example, if he were to bring an action on the contract in the joint names of his wife and himself, and got judgment, that would be sufficient. The consequence of the husband's not reducing the choses in action into possession is that, if his wife dies he will be entitled to them, not as husband, but merely as her administrator, and, therefore, will take them, subject to the payment of her debts

contracted before marriage ; while, if he dies himself, they survive to her instead of going to his representatives.

As to the husband's liability for the *debts* of his wife contracted before marriage, reference must be made to several statutes. The first question is, when did the marriage take place ?

1. If the interesting event came off before August 9, 1870, the unfortunate husband is liable for all.

2. If it took place between August 9, 1870, and July 30, 1874, the husband is not liable for a penny.

33 & 34 Vict. c. 93, s. 12. But the wife can be sued if she has any separate estate.

37 & 38 Vict. c. 50. 3 If the marriage has taken place since July 30, 1874, the husband is liable to the extent of the assets his wife brings him.

In plain English, if I marry a woman with money I must pay off as many of her debts as that money runs to, altho' it may not be separate estate.

Presumption of Death after Seven Years' Absence.

[148.]

NEPEAN v. DOE.

[2 M. & W.]

The effect of this case is that when a person goes abroad and is not heard of for seven years the law presumes him to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death, but does not presume that he died at any particular period during those seven years.

Distressing cases, leading to litigation, constantly arise where whole families have perished by the same calamity. One well-known case on the subject is *Wing v. Angrave*, where a husband, wife, and children, were all washed away by the same wave.

In the Roman law, if a father and son died under such circumstances, it was presumed that the son died first, if he was under the age of puberty ; but, if he was over that age, that the father died first, the principle being that the father would probably be the stronger of the two in the former case, and the son in the latter. We have no presumptions of this kind, and when a similar case arises

we call on a claimant, by survivorship, to give affirmative proof of 8 H. L. C. what he asserts.

The student who cares to pursue this subject further should refer to *Wing v. Angrave* (already mentioned), *In re Phené's Trusts*, L. R. 5 Ch. *Hickman v. Upsall*, and *Prudential Assurance Co. v. Edmunds*. App.

The last-mentioned was rather a curious case. A man named Nutt, about fifteen years ago, carried on business at Cheltenham as a tailor. He was a drunken good-for-nothing fellow; but the Prudential Assurance Company in 1863 insured his life, and Edmunds, the plaintiff, became assignee of the policy. In May, 1867, Nutt left Cheltenham, being at the time afflicted with "inguinal hernia," and none of his Cheltenham friends ever afterwards had any communication from him whatever. In 1874—more than seven years after Nutt had left his home—Edmunds went to law with the company to try and get them to pay the policy money; and the question was whether Nutt was dead or alive. For the plaintiff, Nutt's sister and his brother-in-law gave evidence that they had not heard of him for seven years. But on cross-examination they admitted that a niece of Nutt's had said that when she was at Melbourne in December, 1872, she saw a man whom she believed to be her uncle; but he was lost in the passing crowd before she could get to speak to him. They however, believed her to be mistaken, and the jury expressed a similar opinion. This being so, the plaintiff's counsel at the trial asked the Judge (Kelly, C.B.) to tell the jury that Nutt, having been absent for above seven years without being heard of (as was the fact if the niece was mistaken), must be presumed to be dead. This the Judge declined to do, and charged the jury strongly in favour of the defendants, on the ground *that all the members of the family had "heard" what the niece had stated*. The Court of Appeal considered this to be a misdirection, and, as the House of Lords could not agree on the subject, their decision stood affirmed. 4 Ch. Div. 2 App. Ca.

Estoppel.

DUCHESS OF KINGSTON'S CASE.

[149.]

[20 How. STA. TRI. & S. L. C.]

One of the most beautiful women of the last century was Sarah Chudleigh. Without going minutely into her strange

eventful history, it may be said that in a weak moment she fell in love with a Captain Harvey, and married him. Married in haste she repented at leisure. Being, however, of an ingenious turn of mind, she determined to destroy the evidence of the marriage, and with that object went down to the church where the ceremony had been performed, and tore the leaf out of the register. She had scarcely accomplished this feat when the news reached her that her husband had succeeded to a peerage, and was dying. To reap the benefit of such good fortune, she went straight back to the church, and replaced the purloined leaf. Her husband, however, was not obliging enough to die, and, as the lady was very anxious to marry the Duke of Kingston and become a duchess, she procured an irregular divorce from him and married the duke. After a few years the duke died, leaving his widow a very large fortune. This the duke's heirs were not disposed to allow her to enjoy in peace. They prosecuted her for bigamy, that is, of course, for marrying the Duke of Kingston when she had not been legally divorced from her first husband. The defence to the charge was that the divorce was a legal one, and left her free to marry the Duke of Kingston or any other man or duke.

The judges were required to answer the following questions:—

(1). If a spiritual court decides that a marriage is null and void, is its decision so conclusive on the subject that the marriage cannot be proved against one of the parties in an indictment for bigamy?

(2). Supposing the spiritual court's decision *is* final, may counsel for the prosecution destroy its effect by showing that it was brought about by fraud and collusion?

The first question was answered in the negative, so that it did not much matter to the duchess what the answer to the second was. That question, however, the judges answered in the affirmative, thus doubly settling her grace.

The duchess, however, tho' convicted, was leniently dealt with, and went and lived and died abroad.

YOUNG v. GROTE.

[150.]

[4 BING.]

Mr. Young was a liberal if rash husband. When he went away from home he used to leave blank cheques signed for Mrs. Young to fill up according to her necessities. But on one occasion Mrs. Young did it so clumsily that an enterprising bearer was able to alter "50" to "350," and "fifty" to "three hundred and fifty," and get the cheque cashed in its improved form. On these facts, Mr. Young was held to be estopped by his negligence from throwing the loss on his bankers.

Moral 1. Always keep your cheques well to the left side.

Moral 2. Never let Mrs. B. have anything to do with your cheque-book.

There is an air of immorality about the orthodox definition of an estoppel—"An estoppel is where a man is concluded by his own act or acceptance *to say the truth*;" and, perhaps, among the nice sharp quilllets of our early law, truth rather *was* at a discount. However, now as then, *interest reipublicæ* (if not the lawyers) *ut sit finis litium*; and estoppel operates as a kind of extinguisher on actions and arguments.

Estoppels (which my Lord Coke considers "a curious and excellent sort of learning,"—we only hope the student will agree with him) are of three kinds:—

1. By matter of record.
2. By deed.
3. By conduct (otherwise known as *in pais*).

1. Generally, when the parties are the same, and the point litigated the same, a former judgment recorded is conclusive. Why *should* the public time be wasted by the courts having to decide the same thing over and over again? One has heard of the infallibility of judge's notes (*Bardell v. Pickwick*, 1 Dick.), but a record, our text-books tell us, "imports such absolute verity that—" nothing is too

bad for the audacious person who ventures to call it in question. Thus, if a record in a former action is tendered in evidence, the other side cannot be permitted to show that the officer of the court made a mistake and entered the verdict on the wrong plea. So, too, if it is found that a piece of land belongs to Jones and not to Brown, and final judgment is entered for Jones, Brown cannot in a subsequent action against him for trespass by digging up coals there, plead that the land is his and not Jones's. But if a plaintiff sues in a different right in the second action from what he did in the first (*e.g.*, if the administratrix of a person who has been killed by the negligence of a railway company sues first under Lord Campbell's Act, and then, in another action, for damage to the personal estate) there is no estoppel.

Reed v. Jackson,
1 East.

Outram v. Morewood,
3 East.

Leggatt v. G.N.R. Co.,
1 Q. B. D.

It is to be observed that in an estoppel by record not only the parties themselves, but their privies (*i.e.*, those who claim under them) are estopped. But *res inter alios acta alteri nocere non potest*, for that "alter" had no opportunity of cross-examining.

A good illustration of estoppel by record is afforded by the case of *L. R. 1 C. P. Wildes v. Russell*. Wildes had been a clerk of the peace, and now sued his successor for certain fees of the office. But it appeared that Wildes had been dismissed from his office by the justices in Quarter Sessions assembled for contumaciously refusing to record an order. He wished to show that the order was an invalid one; but it was decided that he could not be allowed to do so.

2. To execute a deed is, like executing a murderer, a very solemn thing, and therefore whatever assertion a man has made in his deed he must stand by. If you execute a bond in the name of Obadiah you are estopped from pleading that your name is Augustus. So, tho' a person who has given an ordinary receipt may show that he has never really received the money, a person who has given a receipt under seal cannot. And the *recitals* in a deed are just as binding as any other part. "I do not see," said a judge once, "that a statement such as this is the less positive because it is introduced by a 'Whereas.'"

Two qualifications of the doctrine of estoppel by deed must be remembered:—

(1). Altho' a person acknowledges in his deed that he has received the consideration money for the service he undertakes to perform, he may nevertheless show that as a matter of fact he has not received it.

(2). A person who is sued on his *deed* may show that it is founded on fraud or illegality, and, if he proves it, the document becomes worthless, p. 90. The great case on this subject is *Collins v. Blan-*

6 Ad. & E. *tern*, which might be glanced at.

2 Exch.

3. The doctrine of estoppel by conduct, as extracted from *Pickard*

v. Sears and *Freeman v. Cooke*, may, without attempting scientific precision, be thus stated :—

Where one person by his words or conduct represents a certain state of things to exist, and thereby induces—no matter whether he intended it or not—another to alter his position, that other is not to be prejudiced by the perfidy or fickleness of the first person.

See *Carr v. L. & N. W. Ry. Co.*, L. R. 10 C. P.

Loftus v. Mau is rather an extreme illustration. An old gentleman induced a niece to come and live with him and nurse his old age by promising to remember her in his will. But the old deceiver did not remember her. It was held, however, in an action against the executors that he was estopped from omitting to make some provision for her, as she had altered her position in consequence of his representations.

32 L. J., Ch. But see *Jorden v. Money*, 15 Beav.

But there are other cases of estoppel by conduct besides those of the *Pickard v. Sears* and *Freeman v. Cooke* kind. A tenant, for instance, is estopped from disputing his landlord's title, and the acceptor of a bill of exchange from denying the signature of the drawer or his capacity to draw; and a young gentleman who takes rent after he comes of age is estopped from denying that the person he takes it from is his tenant.

The case of *Young v. Grote* may be usefully remembered as an illustration of estoppel by negligence—that is, of a kind of estoppel by conduct, viz., negligent conduct. On this subject there has recently been a decision of some importance. A person named Holmes, becoming impecunious, asked the defendant for his acceptance to an accommodation bill. Willing to oblige, the defendant gave him his blank acceptance on a stamped paper, and authorised him to fill in his name as drawer. Holmes, however, finding that after all he did not require accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant put it into a drawer which he did not lock, and to which his clerk, laundress, &c., had access. From this drawer it was stolen, and finally, after having had a drawer's name put on to it, came into the hands of the plaintiff as indorsee for value. It was held in an action that the defendant was not liable on this bill. *Young v. Grote* was distinguished by Bramwell, L.J., from this case, on the ground that in the former case the defendant had voluntarily parted with the instrument, while in the latter it had been got from him by the commission of a crime.

Baxendale v. Bennett, 3 Q. B. D.

In a rather earlier case of some importance, it had been held that “negligence in the custody of a draft, or in its transmission by post, will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it,” and that “negligence to amount to an estoppel must be in the transaction itself, and be the proximate cause of leading the third party into

mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public."

Arnold v. Cheque Bank, 1 C. P. D.; and see *Swan v. North British Australasian Co.*, 2 H. & C. *Baxendale v. Bennett*, 3 Q. B. D.

The law is said to be "favourable to the utility of the doctrine of estoppel, hostile to its technicality." On the one hand, persons must not be allowed to mislead others with impunity; on the other, every little casual remark must not be tortured into an attempt to mislead. In one of the cases just referred to, Bramwell, L.J., remarked, "Estoppels are odious, and the doctrine should never be applied without a necessity for it."

APPENDICES. (a)



STATUTES IN APPENDIX A.

- 29 Car. II. c. 3 (Statute of Frauds).
- 29 Car. II. c. 7 (Lord's Day Act).
- 14 Geo. III. c. 48 (Insurance on Lives).
- 9 Geo. IV. c. 14 (Lord Tenterden's Act).
- 11 Geo. IV. & 1 Will. IV. c. 68 (Carriers Act).
- 17 & 18 Vict. c. 31 (Railway and Canal Traffic Act).
- 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act).
- 26 & 27 Vict. c. 41 (Innkeepers Act).
- 28 & 29 Vict. c. 86 (Partnership Law Amendment Act).
- 33 & 34 Vict. c. 93 (Married Women's Property Act, 1870).
- 34 & 35 Vict. c. 79 (Lodgers' Goods Protection Act).
- 37 & 38 Vict. c. 50 (Married Women's Property Act Amendment Act).
- 37 & 38 Vict. c. 62 (Infants Relief Act, 1874).
- 41 & 42 Vict. c. 31 (Bills of Sale Act, 1878).

APPENDIX A.

PRINCIPAL SECTIONS OF PRINCIPAL STATUTES REFERRED TO IN THE BODY OF THE WORK.

29 CAR. II. c. 3 (1677).

An Act for Prevention of Frauds and Perjuries.

Statute of
Frauds.

1. All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages,

(a) The student is recommended to write the names of such of the hundred and fifty cases as bear on the statutes, maxims, &c., in the Appendices opposite to the passages to which they refer. The author would have done this himself, only he thinks he would thereby have deprived the student of a little useful and innocent amusement.

manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only.

2. Except leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds at least of the full improved value of the thing demised.

4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

17. No contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contracts, or their agents thereunto lawfully authorised.

29 CAR. II. c. 7 (1677).

An Act for the Better Observation of the Lord's Day, commonly called Sunday.

For the better observation and keeping holy the Lord's Day, commonly called Sunday, be it enacted . . . that all the laws enacted and in force concerning the observation of the Lord's Day, and repairing to the church thereon, be carefully

put in execution ; and that all and every person and persons whatsoever shall on every Lord's Day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately ; and that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted) ; and that every person, being of the age of fourteen years or upwards, offending in the premises shall for every such offence forfeit the sum of five shillings ; and that no person or persons whatsoever shall publicly cry, shew forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or shewed forth, or exposed to sale.

14 GEO. III. c. 48 (1774).

An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances except in cases where the Persons Insuring shall have an Interest in the Life or Death of the Persons Insured.

1. Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming :
 . . . be it enacted . . . that, from and after the passing of this Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering ; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

2. And be it further enacted that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such

policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

3. And be it further enacted that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

9 GEO. IV. c. 14 (1828).

Lord
Tenter-
den's Act.

*An Act for rendering a Written Memorandum necessary to the
Validity of Certain Promises and Engagements.*

6. No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (a), unless such representation or assurance be made in writing, signed by the party to be charged therewith.

(a) *Sic.*

7. Whereas it has been held that the said recited enactments [viz., the 17th section of the Statute of Frauds and a similar Irish statute] do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied, and it is expedient to extend the said enactments to such executory contracts: Be it enacted, that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

11 GEO. IV. & 1 WILL. IV. c. 68 (1830).

An Act for the more effectual Protection of Mail Contractors, Stage-coach Proprietors, and other Common Carriers for Hire against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof. The Land Carriers Act.

1. Whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased: And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted . . . that, from and after the passing of this Act, no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following—*that is to say*, gold or silver coin of this realm or of any foreign State, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured and unmanufactured state, and whether wrought up or not wrought up with other materials,

By 28 & 29 Vict. c. 94, it has been provided that the term "lace" in this Act is not to include machine-made lace.

furs or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

2. When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles ; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice without further proof of the same having come to their knowledge.

4. No public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them ; but all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall . . . be liable, as at the common law, to answer for the loss of or any injury to any articles and goods

in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

6. Nothing in this Act contained shall extend, or be construed, to annul, or in anywise affect, any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandises.

8. Nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

17 & 18 VICT. c. 31 (1854).

An Act for the Better Regulation of the Traffic on Railways and Canals.

2. Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; &c.

7. Every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving,

forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability : every such notice, condition, or declaration being hereby declared to be null and void : provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable : provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned ; that is to say, for any horse, fifty pounds ; for any neat cattle, per head, fifteen pounds ; for any sheep or pigs, per head, two pounds ; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned ; in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge ; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. IV. & 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned : provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury : provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage : provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of the 11 Geo. IV. & 1 Will. IV. c. 68 with respect to articles of the descriptions mentioned in the said Act.

19 & 20 VICT. c. 97 (1856).

*An Act to amend the Laws of England and Ireland affecting
Trade and Commerce.*

Mercantile
Law
Amend-
ment Act.

3. No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

4. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of the firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

5. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor,

or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last mentioned person shall be justly liable.

6. No acceptance of any bill of exchange, whether inland or foreign (made after December 31st, 1856), shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorised by him.

7. Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of Her Majesty, and made payable in, or drawn upon any person resident in, any part of the said United Kingdom or islands, shall be deemed to be an inland bill.

13. [In reference to the provisions of 9 Geo. IV. c. 14 and 16 & 17 Vict. c. 113], an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

14. [In reference to the provisions of 21 Jac. I. c. 16, *&c.*], when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators.

26 & 27 VICT. c. 41 (1863).

*An Act to amend the Law respecting the Liability of Innkeepers,
and to prevent Certain Frauds upon them.*

1. No innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except—

- (1). Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or his servant.
- (2). Where the same shall have been deposited expressly for safe custody with such innkeeper. Provided, that, in case of such deposit, the innkeeper may require as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.

2. If any innkeeper shall refuse to receive for safe custody any goods or property of his guest, or if such guest shall through any default of such innkeeper be unable to deposit the same, such innkeeper shall not be entitled to the benefit of this Act in respect of the same.

3. Every innkeeper shall cause at least one copy of sect. 1 printed in plain type to be exhibited in a conspicuous part of the hall or entrance to his inn, and shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

28 & 29 VICT. c. 86 (1865).

An Act to amend the Law of Partnership.

1. The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the

profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person, or the persons, carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to, any liabilities incurred by such trader.

4. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of the person carrying on such business.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

33 & 34 VICT. c. 93.

The Married Women's Property Act, 1870.

1. The wages and earnings of any married woman acquired or gained by her after the passing of this Act [August 9th, 1870] in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also

any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

7. Where any woman married after the passing of this Act shall, during her marriage, become entitled to any personal property, as next of kin, or one of the next of kin, of an intestate, or to any sum of money not exceeding £200 under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman. A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

11. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property, and she

shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels and property to be her property.

34 & 35 VICT. C. 79 (1871).

Lodgers' Goods Protection Act.

1. If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property, or in the lawful possession of, such lodger, and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods and chattels referred to in the declaration.

2. If any superior landlord, or any bailiff, or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress

on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods ; . . . and the superior landlord shall also be liable to an action at law at the suit of the lodger.

37 & 38 VICT. c. 50 (1874).

An Act to amend the Married Women's Property Act, 1870.

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage, is repealed so far as respects marriages which shall take place after the passing of this Act [July 30th, 1874], and a husband and wife married after the passing of this Act may be jointly sued for any such debt.

2. The husband shall in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified ; and, in addition to any other plea or pleas, may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified ; or, confessing his liability to some amount, that he is not liable beyond what he so confesses ; and if no such plea is pleaded, the husband shall be deemed to have confessed his liability so far as assets are concerned.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows :—

- (1). The value of the personal estate in possession of the wife which shall have vested in the husband ;
- (2). The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession ;
- (3). The value of the chattels real of the wife which shall have vested in the husband and wife :

- (4). The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received ;
- (5). The value of the husband's estate or interest in any property, real or personal, which the wife, in contemplation of her marriage with him, shall have transferred to him or to any other person ;
- (6). The value of any property, real or personal, which the wife, in contemplation of her marriage with the husband, shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors.

Provided, that when the husband after marriage pays any debts of his wife, or has a judgment *bond fide* recovered against him in any such action as is in this Act mentioned, then, to the extent of such payment or judgment, the husband shall not in any subsequent action be liable.

37 & 38 VICT. C. 62.

The Infants Relief Act, 1874.

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void ; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of the common law or equity, enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

41 & 42 Vict. c. 31 (1878).

An Act to consolidate and amend the Law for preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels.

8. Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of the court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be).

11. The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void. The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as therein stated, and that the bill of sale is still a subsisting

security. . . . A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

20. Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.

APPENDIX B.

EQUITY AND CONVEYANCING LEADING CASES.

1. **Strathmore v. Bowes.**—Conveyance by wife, even the moment before marriage, *prima facie* good, and becomes bad only on imputation of fraud.
 2. **Elibank v. Montolieu.**—Married woman may come into court as plaintiff for equity of settlement.
 3. **Murray v. Elibank.**—If married woman *dies after decree* directing settlement obtained, *children* entitled to benefit.
 4. **Hulme v. Tenant.**—Bond entered into by husband and wife jointly binds wife's separate estate.
 5. **Huntingdon v. Huntingdon.**—When wife joins with husband in mortgage of her estate of inheritance for his benefit, estate is considered *surety* only.
 6. **Tullett v. Armstrong.**—Separate use clause and restraint on anticipation attach on subsequent marriage.
 7. **Legg v. Goldwire.**—In case of variance between marriage articles made *before* marriage and settlement made *after*, articles will prevail ; but settlement generally when *both* have been made *before*.
 8. **Hornsby v. Lee.**—Leading case as to what is sufficient *reduction into possession* of wife's choses in action.
 9. **Pusey v. Pusey.**
 10. **Somerset v. Cookson.**
- { Equity will decree *specific delivery* up of chattels (*e.g.*, historic horns or ancient altar-pieces) when damages would be no compensation.
11. **Cuddee v. Rutter.**—Equity will not decree *specific performance* of agreement to transfer South Sea stock, since damages would afford sufficient compensation.

12. **Seton v. Slade.**—Equity will decree specific performance against vendee, tho' vendor has not made title within time agreed.
13. **Lester v. Foxcroft.**—Acts of *part performance* entitle plaintiff to specific performance of parol agreement for lease, in spite of Statute of Frauds.
14. **Woollam v. Hearn.**—Plaintiff cannot go into parol evidence to get specific performance of contract *with variation*; but defendant resisting specific performance may so show that by fraud written agreement does not express real terms.
15. **Penn v. Baltimore.**—Equity acts *in personam*, and, if parties are here, will decree specific performance of contract relating to property abroad.
16. **Pawlett v. Pawlett.**—When child intended to be benefited dies, *portion* will not be raised; *legacy* will.
17. **Boraston's case.**
18. **Stapleton v. Cheales.**
19. **Hanson v. Graham.**
20. **Hooley v. Hatton.**—If testator gives a person a legacy of £500 by will, and afterwards of £1000 by codicil, person *takes both*.
21. **Ashburner v. Macguire.**—Specific legacy is liable to ademption by act of testator in his lifetime, but does not abate.
22. **Elliott v. Davenport.**—If legatee dies in testator's lifetime, legacy lapses, altho' given *to the legatee, his executors, administrators and assigns*.
23. **Viner v. Francis.**—If testator gives £2000 to the children of his deceased sister, he means those living at his death.
24. **Leventhorpe v. Ashbie.**—Bequest of personalty in such terms as would have given *estate tail* in devise of realty gives *absolute* interest.
25. **Corbyn v. French.**—Legacy of £500 to trustees of chapel to discharge mortgage on chapel, void under Mortmain Act.

Cases laying down rules to tell whether devise or bequest is vested or contingent, *e.g.*, word "*when*" in will *standing alone* is *conditional*, but may be controlled by context, &c., so as to postpone payment only.

26. **Scott v. Tyler.**—Conditions annexed to legacies, &c., operating unduly in restraint of marriage null and void.
 27. **Howe v. Dartmouth.**—Where testator intended successive interests which cannot otherwise take effect, conversion into permanent securities bearing interest.
 28. **Forth v. Chapman.**—Words “without leaving issue,” when realty is concerned, mean general failure of issue; when personalty, failure of issue at death.
 29. **Braybroke v. Inskip.**—Trust estate *prima facie* passes by general devise.
 30. **Gardner v. Sheldon.**—Devise to Jones after death of Brown gives Brown estate for life by implication, if Jones is heir-at-law of testator; otherwise, no estate.
 31. **Wild's case.**—Devise to person and his children gives estate tail if he has no children at time of devise.
 32. **Harding v. Glyn.**—Words expressing testator's *wish* or *desire* constitute trust.
 33. **Eyre v. Shaftesbury.**—Guardianship given by will to three persons *devolves on survivor*, altho' no words in will expressly saying so.
 34. **Cadell v. Palmer.**—Limitation by way of executory devise, not to take effect till after determination of life or lives in being, and term of twenty-one years as term in gross, and without reference to infancy of any person, valid; further period allowed for gestation, where it actually exists.
 35. **Griffiths v. Vere.**—Trust by will for accumulation during a life contrary to Thellusson Act, good for twenty-one years.
 36. **Talbot v. Shrewsbury.**
 37. **Chancey's case.**
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Bequest by debtor to creditor of sum equal to or greater than debt, a *satisfaction*; otherwise, if sum bequeathed less than debt, or there is express direction in will for payment of debts and legacies.
38. **Ex parte Pye.**—Court leans against double portions, and therefore if parent, after giving legacy to child, advances portion on marriage, a satisfaction.

39. *Noys v. Mordaunt.*
 40. *Streatfield v. Streatfield.*
 41. *Brodie v. Barrie.*
 42. *Cooper v. Cooper.*

Leading cases on *Election*, which is "the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both."

43. *Wilcocks v. Wilcocks.*
 44. *Blandy v. Widmore.*

Leading cases on *Performance*, which proceeds on the principle that "where a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant, he shall be presumed to have done it with that intention."

45. *Silk v. Prime.*—Lands charged with payment of debts, equitable assets, and distributable amongst creditors *pari passu*.
 46. *Hiscocks v. Hiscocks.*—Parol evidence sometimes admissible to rectify mistake in will.
 47. *Ward v. Turner.*—*Delivery* essential to *donatio mortis causâ*.
 48. *Ancaster v. Mayer.*—General personal estate primarily liable for payment of debts.
 49. *Aldrich v. Cooper.*—Leading case on *Marshalling*, which proceeds on the principle that "a person having two funds to satisfy his demands shall not by his election disappoint a person who has only one fund."
 50. *Alexander v. Alexander.*—In an excessive execution of a power, *excess only is void*, if boundary lines clear.
 51. *Tollet v. Tollet.*—Equity will often make *defective execution* of a power good, but will not generally assist in case of *non-execution*.

52. *Aleyn v. Belchier.*

53. *Topham v. Portland.*

{ Execution will be set aside when there has been a *fraud upon the power*.

54. **Edwards v. Slater.**—Leading case on *suspension and extinguishment of powers*. The intention of the donee should be carried into effect so far as it does not derogate from any interest of his own which he may have previously granted.
55. **Bradley v. Peixoto.**—Conditions or restraints inconsistent with and repugnant to any estate or interest to which they are annexed are absolutely void.
56. **Seymour's case.**
57. **Taltarum's case.** { Leading cases on *estates of inheritance*. In Taltarum's case (Edward the Fourth's reign) it was in effect decided that an entail might be barred by a common recovery.
58. **Attorney-General v. Sands.**—Leading case on *Escheat and Forfeiture*. Right to escheat is founded on "the want of a tenant to perform services."
59. **Shelley's case.**—"Wherever a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, *to his heirs* in fee or in tail, the word '*heirs*' is a word of *limitation*, and not of *purchase*." (In plain English, the word is not to be taken as giving the *heirs* anything, but simply as marking out the quantity of estate which the donee himself is to have.)
60. **Tyrringham's case.**—*Common appendant* differs from *common appurtenant* in being connected with arable lands and limited to ploughing or manuring beasts; also, being of common right, it need not be prescribed for; and is apportionable.
61. **Corbet's case.**—Leading case on *common of shack*, which is "the right of persons occupying lands lying together in the same common field to turn out their cattle after harvest to feed promiscuously in that field."
62. **Sury v. Pigot.**—Right of way (unless way of necessity) is extinguished by unity of possession; *aliter*, of a water-course.
63. **Bowles' case.** } Leading cases as to amount of *waste* that
64. **Garth v. Cotton.** } can be committed with impunity.

65. **Rouse's case.**—Person who comes into estate by right, but remains in after his right has expired, is tenant at sufferance and *dominus pro tempore*.
66. **Richardson v. Langridge.**—*Tenancy at will* created by agreement to let so long as both parties please, and rent being reserved accruing *de die in diem*, and not referable to a year, or any aliquot part of a year.
67. **Clun's case.**—Leading case on *apportionment of rent*.
68. **Morley v. Bird.**—Notwithstanding leaning of court in favour of tenancy in common, an interest given to several without words "equally among," or anything that court can lay hold of, is joint.
69. **Lake v. Gibson.** { Persons making purchase for purpose
70. **Lake v. Craddock.** { of joint undertaking or partnership
 are tenants in common in equity.
71. **Wake v. Conyers.**—Court will not exercise jurisdiction in *settling boundaries* unless soil itself in dispute, or other good reason.
72. **Le Neve v. Le Neve.**—Unregistered settlement of lands in register county preferred to subsequent registered one, person taking lands under latter settlement having *notice* of former.
73. **Agra Bank v. Barry.**—Absence of title-deeds will not constitute constructive notice of prior interest, if their absence is satisfactorily accounted for.
74. **Basset v. Nosworthy.**—On the principle that "where there is equal equity, the law shall prevail," court will not interfere against *bonâ fide* purchaser for valuable consideration without notice, if in possession.
75. **Agar v. Fairfax.**—Leading case on *Partition*, which is "the remedy for the inconveniences of undivided ownership."
76. **Mackreth v. Symons.**—*Vendor's lien* prevails against everybody except *bonâ fide* purchasers; the taking another security is not conclusive evidence of relinquishment of lien.
77. **Fletcher v. Ashburner.**—Money directed to be used for buying land, and land directed to be turned into money, are to be considered as that species of property into which they are directed to be converted.

78. **Ackroyd v. Smithson.**—Where purposes of conversion fail, property goes in its original state.
79. **Marsh v. Lee.**—Third mortgagee, having advanced money without notice of second mortgage, and having afterwards bought in first mortgage, allowed to *tack* and squeeze out second mortgagee.
80. **Brace v. Marlborough.**—Judgment creditor buying in first mortgage not allowed to tack, for he did not lend on immediate credit of land.
81. **Russel v. Russel.**—Mere deposit of title-deeds, good *equitable mortgage*.
82. **Casborne v. Scarfe.**—Equity of redemption an estate in the land, which is considered only *security* for money lent.
83. **Howard v. Harris.**—No agreement in mortgage can make it irredeemable, either after death of mortgagor or upon failure of issue male of his body.
84. **Thornbrough v. Baker.**—Executor, not heir, of mortgagee in fee entitled to money secured by mortgage.
85. **Forbes v. Moffatt.**—Leading case on merger and mortgages.
86. **Glenorchy v. Bosville.**—Executory trusts will be moulded, as far as ascertainable, according to settlor's intention.
87. **Tyrrell's case.**—There cannot be a use upon a use.
88. **Ellison v. Ellison.**—Tho' assistance of court cannot be had without consideration to constitute party *cestui que trust*, yet, if legal conveyance actually made, equitable interest will be enforced.
89. **Elliot v. Merryman.**—Leading case as to obligation of purchaser from trustees to see to application of purchase-money.
90. **Dyer v. Dyer.**—Purchase by father in name of son, advancement to son, not resulting trust.
91. **Keech v. Sandford.**—Trustee renewing lease for self, without fraud, and lessor having refused renewal to *cestui que trust*, is nevertheless trustee of lease for latter.
92. **Fox v. Mackreth.**—Trustee cannot generally purchase trust estate from *cestui que trust*.
93. **Robinson v. Pett.**—Court never allows trustee anything for his trouble.

94. *Townley v. Sherborne.* } Trustee not generally responsible for acts or defaults of co-trustee: distinction between trustees and executors as to effect of joining in receipts.
95. *Brice v. Stokes.* }
96. *Row v. Dawson.*—Chose in action assignable in equity, and no particular form of words necessary.
97. *Ryall v. Rowles.*—Assignment of debts without notice to debtor invalid against assignees in bankruptcy.
98. *Dering v. Winchelsea.*—Doctrine of contribution extends to sureties bound by different instruments.
99. *Rees v. Berrington.*—Surety released by creditor *giving time* to debtor.
100. *Chesterfield v. Janssen.* } Equity looks with suspicion on bargains made with expectant heirs.
101. *Aylesford v. Morris.* }
102. *Fox v. Chester.*—Sale of next presentation whilst incumbent dying, not void for simony, if no intention to present particular clerk.
103. *Huguenin v. Baseley.*—Voluntary settlement in favour of person in confidential relation set aside as obtained by undue influence.
104. *Peachy v. Somerset.*—Copyhold tenant who has been leasing wrongfully and cutting down trees not entitled to relief from forfeiture.
105. *Sloman v. Walter.*—Equity will relieve against penalty merely intended to secure enjoyment of collateral object.
106. *Landsdowne v. Landsdowne.* } Equity gives relief for *mistake of law* where mistake is one of title arising from ignorance of elementary principle of law; but generally only for *mistake of fact*.
107. *Beauchamp v. Winn.* }
108. *Stapilton v. Stapilton.* } Agreement entered into for *promise of doubtful right*, binding; but there must be no keeping back material information.
109. *Gordon v. Gordon.* }
110. *Oxford's case.*—Leading case as to principles on which equity will interfere to restrain proceedings at law.

APPENDIX C.

PRINCIPAL LEGAL MAXIMS.

- (1.) Acta exteriora indicant interiora secreta.
(*Overt acts declare a man's intentions and motives.*)
- (2.) Actio personalis moritur cum personâ.
(*A personal right of action ceases at death.*)
- (3.) Actus Dei nemini facit injuriam.
(*The act of God does injury to no man.*)
- (4.) Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat.
(*Instruments ought to be construed leniently, with allowance made for the ignorance of people who are not lawyers, so that the transaction may be supported, and not rendered nugatory.*)
- (5.) Caveat emptor.
(*The buyer must look after himself.*)
- (6.) Cessante ratione, cessat lex.
(*When the reason for a law ceases to exist, so also does the law itself.*)
- (7.) Contemporanea expositio est optima et fortissima in lege.
(*The best way of getting at the meaning of an instrument is to ascertain when and under what circumstances it was made.*)
- (8.) Cuilibet in suâ arte perito credendum est.
(*Every man is an expert in the particular branch of business he is familiar with.*)
- (9.) Delegatus non potest delegare.
(*A person having merely delegated authority cannot himself delegate that authority to another.*)

- (10.) De minimis non curat lex.
(*The law does not trouble itself about trifles.*)
- (11.) Domus sua est cuique tutissimum refugium.
(*A man's house is his safest retreat.*)
- (12.) Ex nudo pacto non oritur actio.
(*In order to ground an action, an agreement must have a consideration.*)
- (13.) Expedit reipublicæ ne quis suâ re male utatur.
(*The good of the State requires a man not to injure his own property.*)
- (14.) Expressum facit cessare tacitum.
(*When all the terms are expressed, nothing can be implied.*)
- (15.) Ignorantia facti excusat, ignorantia juris non excusat.
(*A man may be pardoned for mistaking facts, but not for mistaking the law.*)
- (16.) In contractis tacite insunt quæ sunt moris et consuetudinis.
(*Persons are presumed to contract with reference to habits and customs.*)
- (17.) In jure non remota sed proxima causa spectatur.
(*It is not the remote but the immediate cause that the law looks at.*)
- (18.) Interest reipublicæ ut sit finis litium.
(*It is the interest of the State that litigation should cease.*)
- (19.) Lex non cogit ad impossibilia.
(*The law never urges to impossibilities.*)
- (20.) Lex semper intendit quod convenit rationi.
(*The law must be taken to intend what is reasonable.*)
- (21.) Lex spectat naturæ ordinem.
(*The law takes into account the natural succession of things.*)
- (22.) Modus et conventio vincunt legem.
(*Persons may contract themselves out of their legal liabilities.*)
- (23.) Non dat qui non habet.
(*A man cannot give what he has not got.*)
- (24.) Non omnium quæ a majoribus constituta sunt ratio reddi potest.
(*A reason cannot be given for everything that has been established by our ancestors.*)

- (25.) Omnia præsumuntur contra spoliatorem.
(Every presumption is made against one who spoils.)
- (26.) Omnia præsumuntur rite et sollenniter esse acta.
(It is presumed that all the usual formalities have been complied with.)
- (27.) Omnis ratihibitio retrotrahitur et mandato priori æquiparatur.
(A ratification is taken back and made equivalent to a previous command.)
- (28.) Optima est lex quæ minimum relinquit arbitrio iudicis, optimus iudex qui minimum sibi.
(The best system of law is that which leaves the least to the discretion of the judge; the best judge is he who leaves the least to his own discretion.)
- (29.) Potior est conditio possidentis.
(There is a great advantage in being in possession.)
- (30.) Qui facit per alium, facit per se.
(He who does a thing by another does it himself.)
- (31.) Qui hæret in literâ hæret in cortice.
(He who harps on the mere letter of a written instrument does not get at the pith of the matter.)
- (32.) Qui prior est tempore, potior est jure.
(The law favours the earlier in point of time.)
- (33.) Qui sentit commodum, sentire debet et onus.
(Benefit and burden ought to go hand in hand.)
- (34.) Quicquid plantatur solo, solo cedit.
(Whatever is planted in the ground becomes part of the ground.)
- (35.) Quilibet potest renunciare juri pro se introducto.
(A man may waive a right established for his own benefit.)
- (36.) Quod fieri non debet factum valet.
(What ought never to have been done at all, if it HAS been done, may be valid.)
- (37.) Quod subintelligitur, non deest.
(What is to be understood, is as good if as it were there.)
- (38.) Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.
(When the language of a written instrument is perfectly plain, no construction will be made to contradict the language.)

- (39.) Res inter alios acta alteri nocere non debet.
(A man ought not to be prejudiced by what has taken place between others.)
- (40.) Res judicata pro veritate accipitur.
(The decision of a court of justice is assumed to be correct.)
- (41.) Respondeat superior.
(A man must answer for his dependents.)
- (42.) Salus populi suprema lex.
(The welfare of the State is the highest law.)
- (43.) Sic utere tuo ut alienum non lædas.
(Make such a use of your own property as not to injure your neighbour's.)
- (44.) Solvitur secundum modum solventis.
(Payment is to be made as the payer pleases.)
- (45.) Spondes peritiam artis.
(If your position implies skill, you must use it.)
- (46.) Ubi jus, ibi remedium.
(Where there is a right there, there is a remedy.)
- (47.) Verba chartarum fortius accipiuntur contra proferentem.
(The language of an instrument is to be taken strongly against the person whose language it is.)
- (48.) Verba generalia restringuntur ad habilitatem rei vel personam.
(General words are to be tied down and interpreted according to their context.)
- (49.) Vigilantibus non dormientibus jura subveniunt.
(To get the law's help a man must not go to sleep over his own interests.)
- (50.) Volenti non fit injuria.
(The man who is the author of his own hurt has no right to complain.)

*In antecedentibus et consequentibus fit
 officina iudicialis.*

APPENDIX D.

ORDER XIX. (a)

(*Under the Judicature Act, 1875.*)

1. The following rules of pleading shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law, Admiralty, and Probate.

2. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as hereinafter prescribed deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as hereinafter prescribed deliver to the plaintiff a statement of his defence, set-off, or counterclaim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

3. A defendant in an action may set off, or set up, by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a statement of claim in a cross action, so as to enable the

(a) It is thought that the insertion here of this important Order, which contains the principal rules of pleading, will be found particularly useful to students who are reading, or about to read, in the chambers of barristers or special pleaders.

court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

4. Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary. Forms similar to those in Appendix (C.) hereto may be used.

5. Every pleading which shall contain less than three folios of seventy-two words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.

6. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

7. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the letter and number of the action, the division to which and the judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

8. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counterclaim made, or relief claimed by the

defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

9. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts.

10. Where any defendant seeks to rely upon any facts as supporting a right of set-off or counterclaim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counterclaim.

11. If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

12. In probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

13. No plea or defence shall be pleaded in abatement.

14. No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

15. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

16. Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead, he shall not plead any other defence without the leave of the court or a judge.

17. Every allegation of fact in any pleading in an action, not

being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

18. Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.

19. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

20. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.

21. Subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

22. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

24. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

25. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

26. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

27. Wherever any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

28. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[E.g.—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

29. Where an action proceeds in a district registry, all pleadings and other documents required to be filed shall be filed in the district registry.

30. In actions for damage by collision between vessels, unless the court or a judge shall otherwise order, each solicitor

shall, before any pleading is delivered, file with the proper officer a document to be called a Preliminary Act, which shall be sealed up, and shall not be opened until ordered by the court or a judge, and which shall contain a statement of the following particulars :—

(a). The names of the vessels which came into collision and the names of their masters.

(b). The time of the collision.

(c). The place of the collision.

(d). The direction of the wind.

(e). The state of the weather.

(f). The state and force of the tide.

(g). The course and speed of the vessel when the other was first seen.

(h). The lights, if any, carried by her.

(i). The distance and bearing of the other vessel when first seen.

(k). The lights, if any, of the other vessel which were first seen.

(l). Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(m). What measures were taken, and when, to avoid the collision.

(n). The parts of each vessel which first came into contact.

If both solicitors consent, the court or a judge may order the preliminary acts to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings.

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